near in normal circumstances as possible with dignity. They ought not to have to go to institutions when they could live at home. We put real emphasis on home-based care with a wonderful program in Minnesota, a block grant program not adequately funded. But we are funding it. It is wonderful. It makes all of the difference in the world, and it enables someone who is elderly to live at home. But we did not take any action on that.

We were also talking about some legislation. I introduced the single payer bill covering the catastrophic expenses. Medicare does not cover the catastrophic expenses of what happens to you when you are in a nursing home. Nor does it cover prescription drugs.

My colleagues are not in any of these proposals talking about any of that. They are talking about cutting Medicare. And they want to make the argument it is not really a cut, that it is just a lessening of the rate of increase. Well, why is it such a big surprise to my colleagues that a larger and larger percentage of our population are 65 years of age and over, and a larger and larger percentage of that population tends to be in their eighties? Of course, it costs money. That is what Medicare is about; the commitment to elderly citizens, and that we will fund a decent level of health care for elderly people in our country. This should not come as any shock. And it is a benefits program. It is a contract. It is a commitment we made.

Mr. President, there are, I think, steps that we can take. In some cities and some States you find that the cost of providing coverage is much greater than, for example, what it is in Minnesota. I am sure there are ways that we can move toward more efficiency.

But, Mr. President, I must say that all of a sudden this discussion about now what we are going to do is talk about the trust fund, we are not going to really say this is part of deficit reduction although it was always proposed before as part of deficit reduction. And in addition, we are going to give people all of these kinds of options. So they are really not options because managed care is the place in which you can have the savings but in many parts of the country, especially outside your metro areas, it is not a real option. And in addition, we say, if there are any savings by enabling people to develop to purchase vouchers or all the rest, then in fact we will be OK. But, if they are not, then we are going to have to make the deep cuts. There are not going to be any because, if there are savings, by definition they go to those individuals. They do not go to the Government. We are talking about public expenditures here and how to cut down on the public expenditures.

So I think that some of my colleagues are trying to dance at two weddings at the same time. There was all this bold rhetoric about how we were going to balance the budget by 2002, no question about it. I saw projections of quotes from colleagues that we were going to be cutting Medicare by $400 billion between now and the year 2002. That figure has gone down. But make no bones about it. That is what is being proposed.

Mr. President, I think what we ought to do is move forward on good health care reform, and there are three critical ingredients to that. First, universal coverage; and I promise my colleague from Arizona that I will be finished within 2 minutes. Second, cost containment—and, by the way, the Congressional Budget Office said really the way you can contain costs is you put some sort of limit on what insurance companies can charge. Third, we need to deliver care in some of our underserved communities like, for example, rural areas where we have to put much more emphasis on primary care, on family doctors, on advanced nurse practitioners, on nurses, getting health care out of the communities backed up by specialization.

It is in that context that we contain Medicare costs. But, if we just target Medicare, you are going to have the same irrational charge shifting. You are going to have true rationing by age, income, and disability. You are going to be hurting a lot of citizens in this country. And, we are going to be moving away from a basic commitment that we made in 1965.

So, I look forward to what I think is going to be an extremely important debate but I did want to respond to my colleague from New Hampshire. I am sorry he had to leave.

COMMONSENSE PRODUCT LIABILITY AND LEGAL REFORM ACT

The Senate continued with the consideration of the bill.

Mr. KYL. I thank my colleague.

Mr. President, at this time, I ask unanimous consent to lay aside the pending amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 611 TO AMENDMENT NO. 603

(Purpose: To establish a limitation on noneconomic damages)

Mr. KYL. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Arizona [Mr. KYL] proposes an amendment numbered 611 to amendment No. 603.

Mr. KYL. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place, insert the following new section:

SEC. . LIMITATION ON NONECONOMIC DAMAGES.

(a) IN GENERAL.—With respect to any health care liability action, in addition to any award of economic or punitive damages, a claimant may be awarded noneconomic damages, including damages awarded to compensate the claimant for injured feelings such as pain and suffering, emotional distress, and loss of consortium.

(b) LIMITATION.—The amount of noneconomic damages that may be awarded to a claimant under subsection (a) may not exceed $500,000. Such limitation shall apply regardless of the number of defendants in the action and the number of claims or actions brought with respect to the injury involved.

(c) NO DISCLOSURE TO TRIER OF FACT.—The trier of the fact in an action described in subsection (a) may not be informed of the limitation contained in this section.

(d) AWARDS IN EXCESS OF LIMITATION.—An award for noneconomic damages in an action described in subsection (a), in excess of the limitation contained in subsection (b) shall—

(1) be reduced to $500,000 either prior to entry of judgment or by amendment of the judgment after entry;

(2) be reduced to $500,000 prior to accounting for any other reduction in damages required under applicable law; and

(3) in the case of separate awards of damages for past and future noneconomic damages, be reduced to $500,000 with the initial reductions being made in the award of damages for future noneconomic losses.

(e) PRESENT VALUE.—An award for future noneconomic damages shall not be discounted to present value.

Mr. KYL. Mr. President, this is the noneconomic damages limitation amendment that many of us have been talking about for some time. I indicated earlier this morning that I would be introducing it. It works in tandem with the limitation on lawyer's fees to ensure that the victims of negligence are properly compensated and that neither the public needs to end up continuing to pay this tort tax that we talked about earlier nor that lawyers or others in the system become enriched at the expense of the victims of negligence.

This particular amendment would place a limitation of $500,000 on noneconomic damages that are awarded to compensate a claimant for pain, suffering, emotional distress, and other related injuries.

Mr. President, every day in America, physicians take care of over 9 million patients. These are professionals who are dedicated to the service of their fellow citizens. They do a tremendous job. They serve in times of crisis and natural disasters often at great personal risk. A good example is the heroic service of the doctors in the aftermath of the bombing in Oklahoma City.

The medical profession is dedicated to doing everything possible to ensure that the practice of medicine conforms at all times with both Government rules and regulations and, of course, with the high standards that are inherent in the profession itself.

But physicians are not God. They are human like all the rest of us, and occasionally mistakes are made and sometimes patients suffer injuries as a result. When this occurs, injured patients must be awarded full and fair compensation for their injuries should they choose to pursue a legal remedy. But in today's litigious climate, roughly one-third of all physicians, 50 percent of all

surgeons, and 75 percent of all obstetricians will be sued in their careers.

Let me go through those figures again: 50 percent of all surgeons and 75 percent of all obstetricians will be sued in their careers.

Courts determine that roughly three-fourths of these cases have no merit, and they are ultimately dismissed with no payment being made to the claimant, but the psychological and financial costs of defending these cases, oftentimes frivolous, but these unpredictable situations are staggering. Defending against meritless lawsuits has in effect become an occupational hazard of practicing medicine and, of course, these costs are passed on to all the rest of us in the form of higher medical costs, diminished quality, and access to health care.

Mr. President, as we in the Congress address legal reform, we should not miss the opportunity to rationally address the overly litigious nature of medical liability actions. The Kyl amendment would limit noneconomic damages to $500,000. The amendment would apply only to noneconomic damages, known sometimes as pain and suffering.

No other country compensates victims of health care injuries as generously as $500,000 for noneconomic damages. For example, in Canada, there is a cap on noneconomic damages of $180,000. In a 1994 report to Congress, the Physician Payment Review Commission, which is the Federal Commission established to review Medicare payments, said:

> Much of the unpredictability and inconsistency that characterizes today's malpractice awards is because of noneconomic damages, which account for 50 percent of total payments. Reducing the unpredictability and eliminating the potential for unreasonably high awards would improve decisionmaking during the course of a lawsuit and would promote settlement.

In other words, Mr. President, in order to encourage settlement rather than litigation, we should address this ''lottery mentality'' of awarding arbitrary and unpredictable noneconomic damages.

According to a September 1993 report by the Office of Technology Assessment, and I am quoting now:

> Limits on noneconomic damages is the single most effective reform in containing medical liability premiums.

Let me repeat that, because all of us are concerned now about what kind of health care reform we will be adopting later this year, and in the context of both legal reform and health care reform, this is a startling statement. It is the OTA, 1993.

> Limits on noneconomic damages is the single most effective reform in containing medical liability premiums.

Without a reasonable limitation on these nonquantifiable losses, medical liability insurance premiums and medical product liability costs will continue to skyrocket. Physicians are forced to drop insurance coverage or, in order to minimize the risk, to stop performing high-risk procedures such as delivering babies.

According to a book published by the respected Institute of Medicine called ''Medical Professional Liability and the Delivery of Obstetrical Care,'' the most comprehensive, authoritative study of rural health care access, the delivery of obstetrical care in all rural areas of America is seriously threatened by professional liability concerns: 12.3 percent of the ob/gyn's nationally have given up obstetrics totally due to liability pressures—12.3 percent; 22.8 percent of ob/gyn's nationally have drastically decreased the amount and level of obstetric care they provide. In some States, the problem is much worse than nationally.

In rural Arizona, the most recent study shows that 21 percent of the ob-gyn's have totally stopped providing obstetric care. The reason? The cost of malpractice insurance and threats of suits in Arizona.

Mr. President, how is this system enhancing medical care in our country? Somehow, this system is protecting people in need of medical care? It is precluding physicians from serving the patients, and in the rural areas in particular the kind of care that women delivering babies are getting is less than it could be, less than it should be, because you do not have that obstetrician there helping with the delivery.

There is an impact on the minority community. The National Council of Negro Women believes that ''a cap on noneconomic damages is an essential part of comprehensive legal reform legislation.'' This is in a letter dated just February 14 of this year, from Eleanor Hinton Hoytt, director of national programs of the National Council of Negro Women.

The council realizes that low-income minority communities are facing increasing shortages of physicians who can afford to pay liability insurance premiums.

We know, Mr. President, of many examples of physicians who, on the very first day of the year, January 1, either have to have a liability insurance policy costing them anywhere from $30,000, $40,000, $50,000, $60,000, and even upward of $70,000 before they can see their very first patient, much more than most people in this country make in a year.

The argument may be made that limiting noneconomic damages would restrict the right of an injured patient to sue and collect for economic damages and that, of course, is not true. My amendment does not prevent filing suit and recovering all economic damages for past and future medical expenses, loss of past and future earnings, loss of consortium, loss of employment or any other business opportunity, nor does my amendment limit suits that seek damages for malicious acts for which punitive damages are warranted. A cap on noneconomic damages such as the Kyl amendment does not discourage the filing of lawsuits. In California, which has a cap just half the cap that I am proposing here, a cap of $250,000 as opposed to $500,000, there were 16½ percent more cases filed in 1993 than in 1992, the year before the limit in California went into effect. So it did not preclude the filing of actions.

Moreover, in California, the cost of liability premiums has been reduced in part because of this cap. Prior to imposition of the $250,000 cap in California, the State had the highest liability premiums in the Nation. Premiums are now one-third to one-half the rate in States like New York, Florida, and other States that have not established a limit.

Mr. President, as part of the Contract With America, the House has passed a more restrictive cap of $250,000 on noneconomic damages, the same limit as in some other States, including California. Some in the Senate said, in response to that, that the $250,000 cap may be fine in most cases, but there are always those few exceptional egregious cases that should have a greater limit. So we doubled it. We increased it 100 percent to $500,000. And bear in mind, this would be on top of all of the economic damages awarded, in other words, all of the sums of money required to make the victim whole, to pay for all of the economic losses, losses of future employment opportunities, whatever it might be, including all of the bills, of course. And, as I said, in the case of punitive damage awards, those are not limited by this particular amendment. So we are only talking about the noneconomic damages, those unquantifiable damages. No one can put a dollar amount on how much pain and suffering it is when someone is injured. What we are saying is there should be a predictable sum that at least represents the absolute top.

There is a lot of public support for some kind of cap here. For example, a very recent poll conducted by the Health Care Liability Alliance indicated that 17 percent of the public supports a cap on common noneconomic damages.

So we think, Mr. President, this is an amendment which will strengthen the bill. It will strengthen the Kassebaum-McConnell-Lieberman amendment, which has to do with medical malpractice, and therefore at the appropriate time, I guess sometime after 11 o'clock tomorrow, we are going to call for a vote on this amendment, and I hope it will pass.

I wish to conclude with two arguments that have been made in opposition to this amendment. The first is that the people who are injured by some kind of negligence need to keep the lion's share of the money they win, and the point with respect to these caps is do they not ordinarily keep what they win? And the answer to that, of course, is that that is not true.

According to the Rand Corp., plaintiffs keep only 43 cents of every dollar

spent on medical liability. Over 50 cents goes to the lawyers.

So, Mr. President, what we are trying to do here is to put two amendments in tandem. There is already an amendment which I have offered which would limit the attorney's fees in these kinds of cases. By limiting the attorney's fees, we enable the claimant to keep more of the award. So, at the same time that a cap would be placed on the noneconomic damages, a cap of a half million dollars, the claimants would be able to keep more of that half million dollars because of the limits on attorney's fees.

So the net result is that the claimant will not be hurt, will not have recovery reduced by this cap on noneconomic damages. The claimant will do as well, if not better, by virtue of the fact that we would also limit the attorney's fees. The loser will be the attorney who is trying to get the great jackpot here, the big bonanza, of earning something like $300,000 for 1 hour of work. That will be the loser, not the claimant, with this particular cap.

The bottom line is that the claimants will do as well or better if we combine this with the limitation on attorney's fees.

Second, there is a question that I have heard: Is it not true that a $500,000 cap on noneconomic damages will keep deserving patients from getting million-dollar settlements when they really need them? And the answer is, of course, no.

One of the reasons for increasing the cap to $500,000 rather than $250,000 is to ensure that in that very exceptional cases, in addition to all of the economic damages awarded, there will be an opportunity to get up to a half million dollars.

But the point is that patients with valid claims are today collecting millions of dollars in States with caps, such as California, despite the cap on noneconomic damages there of $250,000. In California, the number of million-dollar verdicts and settlements has hovered around 30 per year throughout the 1990's, with the average indemnity in these cases over $2 million. These million-dollar-plus cases included awards for wrongful death, birth injuries diagnosed in related areas, failure or delay in treatment, and substandard post-surgical care.

So, Mr. President, despite the fact there has been a limit on noneconomic damages in California of only half the amount we are suggesting here, there have still been settlements and awards that far exceed $1 million. So we are not limiting those cases, and everyone acknowledges they are the very small exceptions to the rule here. But we are not limiting those particular recoveries.

In conclusion, Mr. President, there are two amendments that I have offered to the underlying medical malpractice amendment offered by Senators KASSEBAUM, LIEBERMAN, and MCCONNELL. The first is a limitation on attorney's fees, essentially, at 25 percent, although there are some nuances to it, of any recovery. And second is the limitation on noneconomic damages. The two of these amendments, working in tandem, ensure that people will be able to bring claims, that they will be able to recover more of the award either in settlement or by jury verdict themselves, that the attorney will receive less but attorneys will still receive a perfectly adequate compensation, and there will be no disincentive for them to actually bring the lawsuits because the attorney's fees cap is actually high enough so that there is not a disincentive.

The combination of that with the cap on noneconomic damages will enable the plaintiffs to be fully compensated, but also reduce the cost to society as a whole in the form of increased medical malpractice premiums and, therefore, in the form of higher costs charged for medical care generally because those costs have to be passed on by the physicians and the hospitals that have to acquire the insurance.

We believe these are two important and necessary amendments to the underlying legislation. I ask my colleagues to support these amendments.

I yield back my time.

Mr. WELLSTONE addressed the Chair.

The PRESIDING OFFICER (Mr. GRAMS). The Senator from Minnesota.

Mr. WELLSTONE. I wonder whether I would have time to ask a few questions that I would like to ask my colleague from Arizona.

I am not a lawyer, but as I understand it, the whole concept of compensation is to make the individual whole, and there is the economic and then the noneconomic. With this cap of $500,000, how many of the plaintiffs, as we project to the future, how many plaintiffs would lose how much by way of dollars in compensation to make them whole again? What are the projections on what impact this is going to have on those individuals that have been injured in a malpractice?

Mr. KYL. Mr. President, I say to my colleague that the information that we have, according to a study that was recently done, is that less than 2 percent of the cases would be affected by the $500,000 cap. But, of course, because of the large amount of money involved, it would have a very large impact on constraining costs.

Mr. WELLSTONE. Mr. President, my next question would be: If it is less than 2 percent—and I gather that that, as you say, may focus on a few cases where there are large dollars involved—then I would ask my colleague from Arizona, do you have any projections on what impact this will actually have on more doctors? How many more doctors would be practicing medicine in underserved areas, be they rural or inner city, as a result of this cap? Do you have any projections?

Mr. KYL. I would be happy to continue to respond to my colleague, because they are very good questions. They go right to the heart of the issue.

Obviously, by proposing the reform, we are hoping to have an impact pact on the problem. Part of the problem, as I indicated, is the fact that, particularly in rural areas but not limited to rural areas, and in particular ob-gyn's have either stopped practicing or have cut back their practice just to the gynecological services rather than obstetrical services. If you go by the numbers I cited, you have an indication at least of what these physicians were able to do before this litigation system got to the point that it is today.

It is impossible, of course, to predict precisely, but I will go back to the numbers that I stated just a moment ago, because the study was very recent. I think it was either 1993 or 1994. Nationally, 12.3 percent of the ob-gyn's have given up obstetrics totally, due to liability pressures. That is in a book, as I said, that was written by the Institute of Medicine called Medical Professional Liability and the Delivery of Obstetrical Care. Nationally, 22.8 percent of the ob-gyn's have drastically decreased the amount of care they have provided because of this.

So one could conclude that, if we were able to put a cap on these damages, at least some of this problem would go away. But, obviously, because you would still be able to recover up to $500,000 in noneconomic damages, I am not contending that all of these physicians would go back to practicing. Of course, this does not relate either to the increases in costs of the medical malpractice premiums for those physicians who do choose to stay in practice or for those who are involved in other areas of specialty.

So, it is impossible to say with precision, but I think it is safe to say that at least it would reduce medical costs and get some of these rural areas better covered by physician services.

Mr. WELLSTONE. By the way, in the 2 percent of the cases that the Senator mentioned, how much does that translate to in terms of dollars?

Mr. KYL. Let me see if I can get that for you. I do not have that in my prepared remarks.

Mr. WELLSTONE. I guess what I am struggling with here, Mr. President, as I try to figure out the logic of this, if my colleague had said, ''Look, there are lots of cases that this would affect all across the country,'' then I would have said, ''Well, then I understand what you are doing in terms of the negative impact on plaintiffs.'' Many times we are talking about people who have been injured.

But my colleague's response was, it is a relatively small percentage, in which case then the flip side of the coin is, I am wondering—and I wrote it down—if it is 12.3 percent, the figure on ob-gyn's who talked about the problems of excessive payments, I am not at all sure that there would be—I mean, by definition, if there are very few cases, then why would any of us

have any reason to believe that, by putting this cap on, this would have any significant impact on the number of ob-gyn, if you follow me, practitioners in these underserved communities?

Mr. KYL. I think my colleague raises a good point. The mere fact that half of the physicians will, half of the surgeons in the country will be sued for medical malpractice has a great deal to do with the malpractice premium problem as well.

So it is very difficult to tell how much of the problem is due to the large number of cases that will be filed and have to be defended, regardless of whether they have merit or not—three-fourths of them actually being thrown out—and how many problems, on the other hand, are due to very large awards. Because it is impossible to divide those numbers out, it is impossible to say precisely how much good we will do with this amendment.

But this amendment is just one narrow piece of a much larger underlying amendment, as my colleague knows, that is being offered by Senators LIEBERMAN, KASSEBAUM, and MCCONNELL, that hopefully will also deal with the number of claims that are filed.

So we are trying to get at it in three different ways: We are trying to limit the circumstances under which these cases are filed and trying to get them into alternative dispute rather than going all the way through trial, No. 1; second, we are trying to limit the nonessential costs, and in this case, we are saying some of the attorney's costs are just not necessary, we want to give more of that money to the claimants; and third—and I think this goes directly to the point of the Senator from Minnesota—there may not be very many cases where you have these astronomical awards but those few cases do represent a lot of money and they represent a lot of psychological horror to the insurance companies and to the physicians. They are the ones everybody knows about. That is the McDonald's coffee that burned the claimant and all of the other cases that we are very familiar with.

Of course, that is not a medical malpractice case, but it is those kinds of awards that get put into people's minds and it is that which probably, in the case of the insurance companies, ends up causing them to, in effect, dictate to their insured, the physician, that a case be settled, even though I heard a lot of physicians saying, ''I wanted to fight that case because I knew I was not negligent, I knew we didn't cause this damage, or at least it was not negligence,'' but the insurance company said it was cheaper to settle because of the potential for one of these astronomical awards.

Because that is the sense of it, it is probably impossible to tell precisely what effect it will have. But I think a combination of all three of those approaches together will have a significant impact on bringing the costs down.

Mr. WELLSTONE. Mr. President, there are two issues I will address, and I would be very interested in the response of my colleague. One is, and, again, I do not know what the exact amount of money is, my colleague says a small number of cases but there is a significant amount of money involved. If I do not know exactly how many plaintiffs are going to be hurt or denied what I think should be fair compensation, and I do not know exactly what impact this is really going to have on the problem that my colleague identifies—ob-gyn's practicing in some of our underserved communities—then I find it difficult to support this, especially since I struggle with two questions:

One—and I will present both to my colleague so he can respond at once—I can remember, for example, when I was in North Carolina and we had our first son, David, there was a guy I was very close to, a graduate student, who had a son and went in for what was supposed to be regular surgery. Because of malpractice, his son was paralyzed in a wheelchair for the rest of his life. He was a student, he did not have a lot of money, but would anything above and beyond $500,000 for noneconomic damages be too much? That is my first question, and I am not willing to give up on that principle, especially when I do not really have any precise way of knowing what the benefits are of the amendment. And second, I say to my colleague from Minnesota, in 1986, the Minnesota Legislature enacted a $400,000 cap on intangible loss which was defined to mean embarrassment, emotional distress, so on and so forth, and we repealed it the following year because we felt it did not work at all.

This may be good in Arizona, but why should this be applied to the State of Minnesota? We have tried something different. We have some of our own alternative dispute mechanisms, et cetera, et cetera. If it is good for Arizona, fine, but why the Federal preemption on this?

Two questions, if you follow me: A, in all due respect—and, by the way, there is a lot of respect—I still feel like my colleague has not been able to spell out what exactly will be the pluses and the minuses of this, the losses and the benefits, who would benefit, who would not; and, B, therefore, I am a little reluctant to—more than a little reluctant—to give up on two principles, which are, I do not know why, in some cases, we say $501,000 is too much, and why preempt what Minnesota is doing?

Mr. KYL. I will be happy to try to respond to my colleague. First of all, by its very nature, these noneconomic damages are not quantifiable, so no one can say a particular amount is or is not warranted, which is to say of course, except we have put this decision in the hands of the jury. They are no more capable of divining a figure than the rest of us. We ask them to do it. We charge them with that responsibility, and they discharge their responsibility and, in many cases, do so very, very well. But these are very emotional cases, by their very nature. Ordinarily, the jury is well within the bounds of reason when it fixes the damage amount. We are only talking about those very, very exceptional cases, the less than 2 percent which exceed the half of a million dollars.

So no one can say in one case it should have been $501,000 and in another case $499,000. But I think we should be guided by two or three different principles.

First of all, we should understand that all of the economic damages are unaffected by this, so that with regard to the young man who has been confined to a wheelchair there would have to be a question about the loss of his earning power throughout the rest of his life, and he would receive damages for that entire sum of money. If he was building houses or something of that sort, his economic damages would be tremendous at that point, they would probably be in the millions and millions of dollars. In other cases, because of the nature of the economic loss, it would not be. If you are talking about a 65-year-old person who is about at the end of the earning part of their career, the economic damages would not be quite as large. We are already compensating for the economic loss.

Second, since we cannot know precisely how much pain and suffering should be compensated, I think we ought to fix it at a level that is adequate to compensate an egregious case but not such as to permit all of the rest of society to pay a very large price as we are paying.

What kind of a price do we put on the poor woman in rural Minnesota or rural Arizona who loses a child because there is not an obstetrician there to help deliver her baby because the high cost of medical malpractice premiums prevented that person from practicing? I know several communities in Arizona where every one of the OB's have left town because they cannot make it with the high premiums that they have to pay. I have cited these statistics here.

So when we talk about how many millions of dollars should one person receive for being injured, I turn that around and say, how many millions of dollars worth of damage are being caused by the fact that physicians are not able to practice the way we all would like to have them practice and the way they used to practice.

Finally, I note that our amendment does not provide for reduction in present value, therefore, in the case of the young man, the example the Senator cited, that $500,000, since he already received the economic damages—he has been made whole in that sense—this $500,000 can generate maybe several millions of dollars, many millions of dollars of income during that person's lifetime. We are enabling the person to collect the entire sum rather than having it to be reduced to present value.

As to the question why preemption, it is a very good question, because ordinarily we would like to have the experimentation at the State level, and that certainly has been a part of my philosophy over the years. But we found in many areas from standards we have established on health care delivery, from the FDA, in welfare, in so many different areas we have found we want to have some kind of at least minimal national standards.

In the case of people trying to do business and provide insurance so that hospitals and physicians can provide care to people so that they will receive the kind of health care that they need, in order for them to do that, they are going to need to have some kind of standard by which they can operate.

If there is a different standard in every State, it is going to be very difficult—in fact, they have said it—it is very difficult for these insurers to insure against the different standards in different States. So some predictability and a maximum level of exposure, we think, would go a long way toward enabling companies around the country to reduce the overall cost of health care which, of course, would tie into our efforts to try to establish some kind of health care reform later in the session in Congress.

Mr. WELLSTONE. I see other colleagues on the floor. I wanted to speak briefly about an amendment that I have offered.

Mr. KYL. May I say, before my colleague leaves the floor, I appreciate his questions. They are all very good. I wish we had more of an opportunity to engage in colloquy. I think we would get to the bottom of some of these things.

Mr. WELLSTONE. I thank my colleague, too. I think ultimately where I come down on this question is—while some of my objections I have tried to be clear about—I guess I still do not find the argument about the jury being swayed on a motion to appeal that persuasive—and you know what I am going to say. These are the people who vote for us in elections. I will tell you that my State has struggled with this question, and we have passed some significant reform. You may want to do this in Arizona. I think the Senator from Massachusetts ultimately will have the State-opt-out amendment. It seems that States—the Federal preemption bothers me to no end and not trusting juries, which are citizens, to make these decisions when we trust them to elect us to office, I think is a curious irony. I think that is one of the flaws in the proposal.

I know the Senator presents this in very good faith. I agree with the Senator—not on his amendment, but I agree and we share a very strong common commitment and interest—and I look forward to working with you on this—about how we can make sure that some of our underserved areas, where we have men and women that can deliver dignified and affordable health care. In rural Minnesota, the issue is not any longer whether you can afford a doctor but whether you can find one. I do not think the cause of that is what you think is the cause. But I think we can work together. I thank my colleague.

I want to briefly speak about a ''Dear Colleague'' letter I have sent out on an amendment I introduced on Friday. This amendment deals with what is called the national practitioner data bank, which was created in 1986.

Mr. President, this data bank provides information in two decisive areas that are extremely important to provide this. One is the area of what is called adverse actions. When an adverse action has been taken against a doctor by a hospital or by a medical board, essentially saying to that doctor, ''You cannot practice medicine at this hospital any longer because of a pattern of negligence,'' or ''you cannot practice medicine in the State any longer,'' then that information—very important information—goes into this data bank.

Mr. President, the second kind of information that is critically important that goes into that data bank is information that deals with malpractice payments. When in fact a doctor has made a malpractice payment, then going into this national practitioner data bank is very important information on how many times this has happened and what amount has been paid.

Mr. President, this is, I think, the bitter irony to it. This information in the national practitioner data bank is available to hospitals; it is available to doctors; it is available to managed care plans; it is available to just about everybody but the consumers. It is not available to the consumers.

Now, Mr. President, what we do in this amendment is a couple of different things. First of all, we really strengthen the disclosure of this information in a couple of different ways. What this amendment calls upon is for the Secretary of Health and Human Services, over a 6-month period—every 3 months he comes to Congress, and 3 months later promulgates rules as to the best way to make sure that this information gets to consumers. Understand, Mr. President, there are 80,000 deaths a year for medical malpractice, from negligence, and 300,000 people injured.

Now, I want to be clear for colleagues that tomorrow when I speak on the floor when all of our colleagues are back, in summarizing this amendment, I am going to make this point again. We are very clear that what goes into this data bank is not when someone complains about the doctor—that is not part of the data bank. It is only when there has been an adverse action taken or a malpractice payment has been made. That is all there is. I mean, for example, if you go to a dentist and you do not like the dental work, you are pretty angry about it and you feel like you were put in a lot of pain and you say, ''Look, I want to get my money back,'' and he says, ''I do not want to deal with you, here is your money back,'' that is not in this data bank. It is only when an actual adverse action has been taken or there has been a malpractice payment. That is very important. That is the only information.

Moreover, Mr. President, in response to what I think were some fairly legitimate questions from the providers, we have done a couple of other things in this amendment which I think are important. First, we list the norms, we were just talking about obstetricians, and we were talking about that in terms of rural areas. We list the norm for each subsection of the health care profession so that, for example, if you were to see there had been a malpractice payment, one or two with an obstetrician, you might think that is bad. But if you saw the norm for obstetricians and it looked pretty good, you would not be nearly as worried. We make sure the norms are listed for each part of the medical profession that a consumer would have access to.

Second, since insurance companies sometimes say to a doctor, ''Look, just settle,'' and the doctor really does not want to, does not feel he or she did anything wrong but that is the best thing to do, we make sure that is part of that data bank, that provider's perspective analysis of what happened and why it is a part of the data bank. This is available as part of the data base.

Fourth of all, Mr. President, we deal with what is a very serious problem. Maybe tomorrow, because I see my colleague from Ohio and I promise I am going to try and finish within 5 minutes—maybe tomorrow I will give examples which are very heartrending. But all too often what happens is—and we are not talking about, thank God, many doctors—but all too often what happens is that you have a doctor who has had an adverse action taken against him—and I know my colleague from Ohio is interested in this question—and he actually leaves the State, changes his name, and commits the butchery again. What we make sure of—and we have examples of this in a number of different States, and this has been a proposal that Health and Human Services has made for some time—as a matter of fact, the Social Security number is entered into this data bank, so it is much easier to track those individuals—so that, Mr. President, if you had to have back surgery in Minnesota and you wanted to check—and God forbid there had been somebody who came from Ohio who literally had an adverse action taken against him, and he no longer was able to practice in the State, changed his name in Minnesota—you could track that person. You could have access to that kind of information.

Mr. President, I really believe that this amendment is extremely important. Here we are talking about malpractice reform—med-mal amendments. I am saying that one of the

ways we can prevent this malpractice or this negligence from happening in the first place is to make sure consumers have this information. I really find it a very weak argument, and weak arguments were made as to why we cannot do it. Some say, ''Let us study it,'' or ''We need to improve the data.'' We have, as a matter of fact; we have plugged some of the loopholes.

In any case, it is far better that we make sure the consumers have access to this information. I am a little startled at some of the opposition to this. If in fact this information is available—and you could go to a court in any State and get it. But it is not readily available to consumers. It is readily available for hospitals, for doctors, medical boards, medical societies, and managed care plans. The only people that do not have access to this information are the consumers.

So it seems to me that this amendment strengthens what we are trying to do here, especially if what we are trying to do here does, I hope, in part, prevent this kind of negligence from happening in the first place.

I do not think there is any reason why a Senator should vote against what is a strong consumer protection amendment. Tomorrow morning, I will, if there are any Senators who want to debate this, be pleased to debate it. Or later on today, we will do so, as well.

I yield the floor.

AMENDMENT NO. 612 TO AMENDMENT NO. 603

(Purpose: To clarify that the provisions of this title do not apply to actions involving sexual abuse)

Mr. DEWINE. Mr. President, I ask unanimous consent that the pending amendment be set aside so that I may offer an amendment.

Mr. WELLSTONE. Mr. President, reserving the right to object, is this a medical malpractice amendment?

Mr. DEWINE. It is, indeed.

Mr. WELLSTONE. Mr. President, I no longer object.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DEWINE. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Ohio [Mr. DEWINE] proposes an amendment numbered 612 to amendment No. 603.

The amendment is as follows:

In section 12(5) of the amendment, add at the end thereof the following new sentence: ''Such term does not include an action where the alleged injury on which the action is based resulted from an act of sexual abuse (as defined under applicable State law) committed by a provider, professional, plan or other defendant.''.

Mr. DEWINE. Mr. President, the underlying amendment that we are considering, the McConnell medical malpractice amendment, would place a cap on the punitive damages that may be awarded by a jury against a doctor or against other medical providers.

My amendment would except out from this cap sexual assault and sexual abuse.

The underlying amendment, Mr. President, does set this cap. By setting the cap, it also sets a cap on all medical malpractice cases, including cases where the doctor has committed a sexual assault, some form of sexual abuse, against the patient.

Mr. President, I find no logical reason for this Congress, as we debate the issue of medical malpractice, to impose our will on the States and say to each State no longer can a person have unlimited punitive damages against those who a jury has found or an individual who a jury has found has sexually abused his patient.

I find no logic behind that, and I think it would be, quite frankly, morally wrong for this Congress to impose such a limit.

Mr. President, the amendment I have just sent to the desk would add, at the end of the relevant section, the following new sentence:

Such term does not include an action where the alleged injury on which the action is based resulted from an act of sexual abuse (as defined under applicable State law) committed by a provider professional, plan, or other defendant.

Mr. President, it is not my intention at this time to talk about the underlying merits of the amendment. What I will try to do, instead, is make absolutely certain by my amendment, that this legislation does not have a truly disastrous, if unintended, consequence, one that may well occur if we do not make the legislation absolutely crystal clear.

Mr. President, sexual abuse is a horrible problem in this country. Two and a half percent of all medical malpractice cases involve sexual abuse.

In the last reporting period, Mr. President, it was reported that this totaled 173 cases of not only medical malpractice, but of sexual abuse.

Clearly, Mr. President, there are a few doctors out there who are engaging in very reprehensible conduct. These cases involve a brutal violation of one of the most sacred relationships that exist; that is, the relationship between a doctor and his or her patient.

When a person goes to a doctor, that person establishes that sacred relationship. That person goes to a place where she or he can be healed and certainly not hurt. The patient goes to a doctor in a spirit of trust, someone who is bound by a sacred oath not to violate that trust.

Mr. President, tragically, at least 173 women have recently discovered that they had misplaced that trust. They trusted someone who posed as a healer but who it turns out was, in fact, a predator. When they entered the doctor's office, they certainly did not expect that it would turn into an outrageous, humiliating, criminal nightmare.

Let me talk about a few cases that have been in the news recently. Let me talk about a woman in Virginia who went to a doctor because she and her husband wanted to have children. They asked the doctor, because they had that problem, to help them start this pregnancy. The doctor led them to believe that the husband's semen would be implanted in the wife by artificial means.

The woman became pregnant, all right. But tragically, it turned out that the semen was not her husband's but was, rather, the doctor's. It was later revealed that the doctor had literally made a practice of impregnating his own patients.

Mr. President, what words can we summon to express the rage that we all feel when we hear about this kind of outrageous conduct?

Mr. President, it has been said that one of the problems we have in this country today in our society is that we accept too much, we tolerate too much; we see so much on TV that is sad and brutal that we just pass it off and say that that is just the way it is.

I think, Mr. President, we need to really recapture a spirit of outrage, a sense of deep shame, a sense that we are not going to tolerate this anymore, that we are really going to succeed in deterring this kind of intolerable behavior. It is that sense of outrage that we must have.

Would it be right, would it be just, for this Congress to impose a cap and tell the State of Virginia to tell that jury in Virginia, ''You cannot impose punitive damages above a certain amount in this particular case''? I think the answer is, clearly, no.

We cannot tolerate what happened to a woman in Connecticut. She had been going to a dentist for about 10 years. She was going to get a molar filled. The dentist sedated her with nitrous oxide. She woke up, Mr. President, three times in the next hour and 15 minutes.

The first time, she found the dentist kissing her and she felt pain in her breasts. She attempted to resist and saw the doctor turn up the concentration of nitrous oxide so that she would pass out again, which she did. The second time she woke up, she found the dentist on top of her, and the third time she woke up the dentist was still on top of her.

She felt very scared and very sick. The dentist realized she was awake. He helped her out of the chair. He grabbed her and kissed her. The woman did not remember any dental work ever having been done in that visit.

During her excessive exposure to the nitrous oxide, some obviously went into her lungs. And stomach acid had actually gone into her lungs, leaving her with a permanent asthma condition and permanent loss of 30 to 40 percent of her lung capacity.

Would it be right to tell the jury in Connecticut, ''No, in this case, there will be a cap on the punitive damages

that can be awarded''? I do not think so.

In another case, a Florida woman thought she was receiving periodontal treatment. She awoke from the anesthesia the doctor had given her and found the doctor touching her private parts. Would it be right, in that particular case, Mr. President, to impose a cap? Again, I think not.

Mr. President, according to a recent study, in one-third of the sex abuse cases—in one-third—the doctor was permitted to go on practicing medicine. Patients today are being treated by those doctors, totally unaware of the doctors' history of obscene conduct.

Sometimes, tragically, it takes time for justice to be done. An investigation by ABC News revealed that a gynecologist in southern California sexually abused as many as 200 women over a 30-year period. It took almost 20 years after the first complaint for California authorities to start proceedings against him. But in that case, the very first complaint really told the whole story. The victim wrote that while the doctor was examining her pelvic region he began sexually abusing her and using foul language. My amendment would exclude this kind of behavior from the changes contemplated in the bill we are considering. This medical malpractice amendment should not have caps which would affect sexual abuse.

The Senate may decide to cap damages in case of medical malpractice. But there certainly is no logical reason to extend that protection to individuals who sexually abuse their patients. It would, I believe, be morally wrong. Indeed, I believe it would be outrageous for this Congress to protect, by the use of a cap on punitive damages, individuals who sexually molest or abuse their patients. Under my amendment, all of the remedies currently available for victims of this kind of sexual abuse will continue to remain available to them under the applicable State law.

Punitive damages are historically used to punish and to deter. Let us not limit the punishment of these sex offenders. Let us not limit the deterrent effect on these sex offenders. Let us allow juries the full latitude they need to punish and the full latitude they need to deter these offenders. That is what this amendment would do.

The vast majority of doctors in this country do a fantastic job. We rely on them for literally the most precious thing in our lives, which is the health and welfare of our family members. Each one of us has had, we hope, great experiences with these doctors. This amendment should not in any way reflect on these doctors. All we are saying by this amendment is let us not have the U.S. Congress interfere with a jury, interfere with a State, interfere with the people's right to punish and deter the small minority of doctors who violate the sacred trust that the patient has given them.

The same amendment I am offering today was offered by Senator KENNEDY in the Labor and Human Resources Committee. The committee passed that amendment and it is my hope the full Senate will, tomorrow, do the same.

The American jury speaks with the voice of America's deepest conscience. That is why I want to make sure the jury keeps the power, the power to punish fully these horrible violations of trust by some truly warped and dangerous individuals.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HATCH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. THOMAS). Without objection, it is so ordered.

BASHING BUSINESS/HELPING LAWYERS

Mr. HATCH. Mr. President, during debate on the products liability bill last week, some of our colleagues who defend the status quo made comments on the punitive damages issue to which I would like to say a few words.

I heard one comment to the effect that, ''if a multibillion-dollar corporation makes a mistake in building a bus and the bus explodes, to punish a multibillon-dollar corporation $250,000 or three times economic damages is not going to cut it.''

First, let us understand that punitive damages were not conceived for application in cases of mere mistake, mere negligence. They are intended for application in cases of much, much more serious conduct. The underlying bill, which speaks to conduct carried out with a conscious, flagrant indifference to the safety of others is the kind of standard usually employed before punitive damages are found appropriate.

Second, given today's regime of compensatory damages, the cost of litigation, and adverse publicity, punitive damages infrequently are needed to punish and deter such misconduct. In the case of the exploding bus, if it had resulted from the kind of conduct triggering a right to punitive damages under the law today, all of these factors would combine as a powerful incentive for the company to reform its practices. But, the underlying bill hardly does away with punitive damages, it simply places rational limits on their award.

Third, the current, largely uncontrolled nature of punitive damages is anticonsumer. The threat of these awards must be built into the cost of services and products today, even before we get to the impact on prices when runaway awards are handed down. Punitive damage reform is proconsumer.

I will have more to say about this subject when Senator DOLE offers his amendment on punitive damages to broaden the scope of the provision now in the bill. I believe my colleagues might be interested in the testimony of George L. Priest before the Judiciary Committee on April 4, 1995. Mr. Priest is professor of law and economics at Yale Law School and has taught in the areas of tort law, products liability, and damages for 21 years. He has served as director of the Yale Law School Program in Civil Liability since 1982.

He appeared before the committee as a private citizen, and not as a representative of any interest or lobbying group. His scholarship has led him to the conclusion that the kind of reform on punitive damages that Senators GORTON and ROCKEFELLER are talking about, and which Senators DOLE and I and others would like to extend beyond products liability, would be beneficial to consumers. He also concluded that punitive damages do not serve a deterrent purpose. He testified:

> I have never once seen a careful study in a specific case showing that a punitive damages judgment of some particular amount was necessary to deter some particular wrongful behavior.

Professor Priest unhesitatingly stated that the view—

> That ever-increasing civil liability verdicts, including punitive damage verdicts, would serve to reduce the number of accidents * * * has been totally discredited today, and I know of no serious tort scholar publishing in a major legal journal who could maintain it.

He added:

> It is widely accepted—and it is a routine proposition of a first year modern torts course—that compensatory damages * * * serve as a complete deterrent in addition to their role in compensating injured parties.

I ask unanimous consent that Professor Priest's testimony be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HATCH. Thank you, Mr. President.

Now, Mr. President, let me address another point made on the floor last week. It was asked, how can Congress know how to limit judges and juries in making punitive damage awards, how can we lay down a rigid law?

Mr. President, I find the criticism odd in the extreme. These same Senators would not dream of imposing punishment, be it jailtime or criminal fines or both, on some violent thug, without according that criminal a full panoply of procedural protections, clarity in the law as to what constitutes criminal conduct, and certainly, a defined set of punishments. That is what we do before we seek to punish anyone in our society for criminal misconduct.

But, because some of the opponents of change in our civil justice system like to mischaracterize the issue before us as a matter involving only businesses, they apparently could not care less if defendants are punished in a civil case in an almost totally uncontrolled fashion. It is OK I guess in their

eyes to bash business. It is OK to unload on large, medium, and small businesses. What the heck, some of our Nation's lawyers make out just fine. Forget about the fact businesses, especaily small businesses, provide the jobs in this country. Forget about the fact they bring new products and services to the American people. Who cares if runaway punitive damage awards stifle innovation, curtail products and services, hurt employment, and deplete company assets for use in compensating other victims of the company's wrongdoing? Let us just bash American business and watch some of the Nation's lawyers laugh all the way to the bank. I am not being critical of all lawyers by a long shot and I understand the crucial role lawyers play in vindicating individual rights. But, today, the biggest beneficiaries of the stubborn defense of the status quo are some of our Nation's lawyers—not consumers.

And the opponents of change can wave around lists of consumer organizations that also oppose change. But the American people for whom they claim to speak, favor change. They know the civil justice system is broken.

EXHIBIT 1

TESTIMONY OF PROF. GEORGE L. PRIEST BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Mr. Chairman, I am grateful for the opportunity to testify on the subject of punitive damages reforms being considered by your Committee. I am the John M. Olin Professor of Law and Economics at Yale Law School, and have taught in the areas of tort law, products liability and damages for 21 years—the last 15 years at Yale. I have served as the Director of the Yale Law School Program in Civil Liability since 1982.

Over the course of my career, I have written broadly on the fields of tort law and damages. A major area of my interest has been jury verdicts in civil litigation. I have published many empirical studies of jury verdicts, including verdicts involving punitive damages. I was one of the original organizers of the now-famous Rand Corporation studies of jury verdicts that began in the early 1980s.

The concern of my scholarship universally has been how the civil justice system can be reformed to benefit consumers in our society and low-income consumers most of all. I have no particular concern to define what is beneficial to manufacturers or to other corporate entities, except as their activities provide benefit to consumers. I wish to emphasize that I am testifying today at your invitation, solely in my capacity as a private citizen interested in the effects of tort law and punitive damages on American consumers. The views presented here are mine alone and do not represent those of any interest or lobbying group.

As an academic, my job is to study and define the ideal world and the system of laws that would most benefit American citizens. The reform of punitive damages alone—even reforms that would cap punitive damages or introduce a proportionality cap—will help consumers, but will not achieve the ideal. I believe consumers in this country would be benefitted all the more if Congress (or our courts) were to modify substantive standards of civil liability, reducing the scope of liability and cutting off at the source a great deal of what today is needless and counterproductive litigation. Indeed, if such reforms were introduced, changes in punitive damages might not be necessary because punitive damages awards would nearly disappear. That world, however, is the ideal, and we should not allow hope for the ideal to discourage support for true reform. As I hope to convince you, sharp yet reasonable Congressional limits on punitive damages will constitute true reform to the benefit of all American citizens.

THE INCREASING COMMONALITY OF PUNITIVE DAMAGES

Forty years ago, punitive damages verdicts were exceptionally rare and were available against only the most extreme and egregious of defendant actions. The world of civil litigation is surely different today. But the number and, especially, magnitude of punitive damages judgments have increased dramatically. Indeed, the frequency of claims for punitive damages has increased to approach the routine. These claims affect the settlement process, both increasing the litigation rate[1] and, necessarily, increasing the ultimate magnitude of settlements even in cases that are settled out of court.

I recently participated in an empirical study of punitive damages verdicts that illustrates the point. The study reviewed claims and verdicts for punitive damages in several counties in Alabama—a state in which it has been alleged that punitive damages verdicts have skyrocketed over the past decade.

The study first addressed the extent to which tort actions filed included claims for punitive damages. Many commentators have dismissed concerns about punitive damages on the grounds that there are very few ultimate punitive damages verdicts reported. In the American system of civil justice, of course, very few verdicts of any kind are reported, relative to the number of claims filed, since only 2 to 5 percent of civil cases filed ever proceed to a verdict.[2] The better test of the frequency and impact of punitive damages, thus, derives from a study of claims.

Here are the results: Bullock, Lowndes, and Barbour Counties in Alabama are relatively rural locales, with small populations and without substantial industry. We studied all tort actions filed in these counties for several fiscal years to determine the numbers in which punitive damages were claimed. To summarize the most recent statistics, we found that, in the fiscal year 1992–93, of all tort cases filed in Bullock County, 76.5 percent included a punitive damages claim; 65.1 percent in Lowndes County; and 78.3 percent in Barbour County.[3]

The exceptionally high proportion of punitive damages claims and the universality of such high proportions over each of the counties are striking and nearly incredible. Again, the study was not limited to only claims involving high dollar amounts or product liability claims or, even, claims against corporate defendants; the study addressed all tort claims. Anyone familiar in the slightest with our civil justice system knows that most tort actions involve relatively routine forms of accidents, including traffic accidents. That 65 to 78 percent of all tort actions over a fiscal year include punitive damages claims starkly challenges the notion that punitive damages are an infrequent and seldom invoked remedy in American civil law.

Yet, incredible as these numbers may seem, in the succeeding fiscal year, the proportion or number of tort cases including a punitive damages claim actually increased in each of the counties. During the 1993–94 fiscal year, an extraordinary 95.6 percent of tort cases filed in Bullock County included a punitive damages claim; 78.8 percent in Lowndes County. In Barbour County, the proportion of tort cases including a punitive damages claim decreased from 78.3 to 72.1 percent, but the absolute number of punitive damages claims increased during 1993–94 by over 40 percent.

Much of the debate over punitive damages proceeds in the form of battle by competing anecdote in which a defender of our modern regime will present a case of exceptionally egregious defendant behavior deserving of punitive damages, and a supporter of reform will present an opposite example. (Indeed, I present an anecdotal case—though a telling one—below.) The Alabama numbers belie anecdotes. No one can plausibly claim that 72.1 to 95.6 percent of all accident cases over an entire year in any county of the U.S. involve the form of exceptionally egregious defendant behavior that might merit substantial punitive damages. In contrast, these numbers show that the role of punitive damages has changed dramatically in our civil justice system, from an occasional remedy invoked against outrageous action to a commonplace of tort law practice.

These numbers also belie the commonly-heard defense that actual punitive damages verdicts are rare and that many of those awarded by juries are later reduced on appeal so that there is no substantial effect. Debate can be had on what is meant by the term ''rare'' and what constitutes in terms of magnitude of verdicts a ''substantial'' effect. The impression is often suggested, however, that even for the Nation in its entirety, punitive damages claims amount to nothing more than a handful.

Our Alabama study demonstrates that this is a great misimpression. Again, we did not select the largest cities in Alabama or industrial or manufacturing centers; in fact, just the opposite: The counties that we studied in Alabama are rural, with modest populations, and a relatively non-urbanized citizenry. For example, Bullock County has a total population of only 11,042, 4,040 of whom are employed, and a per capita income of $9,212; Lowndes, a total population of 12,658, 5,300 employed, and a per capita income of $10,628. Barbour County is somewhat larger, with a total population of 25,417, 12,400 employed, and a per capita income of $12,100. None of these counties, however, resembles in the slightest metropolitan areas such as Miami, Los Angeles, or Dallas.

What did we find? In 1993–94, despite these small populations, punitive damages claims constituted far more themselves in these rural counties than the claimed nationwide ''handful''. In Bullock County, 43 of 45 tort actions included a punitive damages claim; in Lowndes County, 52 of 66; and in Barbour County, 93 of 129. Are punitive damages in Alabama insignificant? The claims reported above, of course, are quite recent and remain still in the litigation pipeline. Looking to much earlier claims, however, our study in Alabama showed that the magnitude of punitive damages judgments affirmed by the Alabama Supreme Court from 1987 through the first half of 1994 equalled $53.2 million,[4] equal to roughly $13 per Alabama citizen.

This study demonstrates that the number and magnitude of affirmed punitive damages verdicts is only the very small tip of an extraordinary iceberg. Again, it is universally conceded that only 2 to 5 percent of cases filed ever proceed to verdict. Thus, it is not surprising that the systematic observation of any single type of verdict is relatively rare. What the Alabama numbers show is that the availability of unlimited punitive damages affects the 95 to 98 percent of cases

Footnotes at end of article.

that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation. Thus, as shown in the Bullock, Lowndes, and Barbour County figures, our modern rules with respect to punitive damages impose these effects on 95.6 and 72.1 percent of even settled cases. Punitive damages reform—especially if it extends to all state and federal litigation, not simply products liability—is desperately needed.

DO PUNITIVE DAMAGES SERVE A NECESSARY DETERRENT PURPOSE?

Virtually every supporter defends punitive damages on grounds of deterrence, accompanied by an anecdote or anecdotes involving persons who suffered serious losses in contexts in which most observers would agree that the respective defendant should have prevented the accident. Generally, the anecdotes are allowed to speak for themselves: I have never once seen a careful study in a specific case showing that a punitive damages judgment of some particular amount was necessary to deter some particular wrongful behavior. Instead, the argument proceeds by implication. The basic defense of punitive damages—and I believe that it is the only serious defense—is the implication that large, unlimited punitive damages verdicts are necessary to control injurious activities in the society. Put slightly differently, it is implied that, without the availability of unlimited punitive damages awards, potential defendants, especially corporate defendants, would face no deterrent threat to prevent them from causing injuries.

Forty years ago, in a tort law regime that provided little in the way of consumer remedies, it might have been believed that ever-increasing civil liability verdicts, including punitive damages verdicts, would serve to reduce the number of accidents.[5] That view, however, has been totally discredited today, and I know of no serious tort scholar publishing in a major legal journal who could maintain it. Instead, it is widely accepted—and it is a routine proposition of a first-year modern torts course—that compensatory damages—economic losses and pain and suffering—serve a complete deterrent purpose in addition to their role in compensating injured parties. Compensatory damages impose costs on defendants who wrongfully fail to prevent accidents, costs equal in amount to the injuries suffered. Compensatory damages internalize injury costs to defendants where some action has wrongfully injured an innocent party.

Indeed, the strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents—not too little and not too much.[6] For purposes of deterrence or accident prevention, given full compensatory damages, there is no need for punitive damages of any dimension, not to mention unlimited punitive damages. Of course, this is a theoretical conclusion, and there remains dispute in the academy as to whether as an empirical matter court or juries calculate compensatory damages exactly perfectly in every case or in every context. Thus, substantial academic attention has been given to the refinement of liability so that the deterrant effects of compensatory damages may be sharpened.

Given the role of compensatory damages as a deterrent, however, the analysis of punitive or other exemplary damages becomes substantially different. The only justification on grounds of deterrence for any exemplary award beyond the compensatory is that compensatory damages are inadequate for some reason, say, that juries award damages too low in some dimension or that some set of injuries go undetected or are perhaps too insignificat individually to justify litigation.[7] The only plausible defense of punitive damages on deterrence grounds, thus, is to restore aggregate damages to a level equal to that that is fully compensatory.

Opponents of punitive damages reform in current Congressional debates avoid this issue, but this failure to confront it suggests the ultimate weakness of their opposition. Again, anecdotes involving individuals suffering serious serious loss are not generally helpful to the analysis. I am extremely sympathetic—as all of us are—to individuals suffering serious injuries. We all wish that the wrongfully injurious action might have been avoided. Given a wrongful injury, we all want the victim to receive full compensation for economic losses and pain and suffering.

The question for punitive damages tort reform, however, is: Given full compensation to the victim, is there some affirmative deterrent purpose served by awarding further damages? Is there some reason to believe that the payment of full compensatory damages will fail to deter the defendant, such that some further multiple of punitive damages is absolutely necessary? For corporate defendants, the answer surely is no. Corporate defendants who must maximize profits net of costs must necessarily take the prospect of compensatory damages into account in determining how to invest in accident prevention. Again, this analysis presumes full compensation. If there were some reason to believe that juries were systematically undervaluing economic losses or pain and suffering, punitive damages might be necessary to make up the shortfall. (Of course, the opposite is true; many, including myself, believe that juries overvalue compensatory damages, especially pain and suffering, justifying Congressional limits on pain and suffering awards.) Barring such a shortfall, however, there is no justification for punitive damages on deterrence grounds.

The analysis is, perhaps, somewhat different in the context of individual noncorporate defendants who are less subject to cost constraints and, perhaps, more inclined to behave unconscionably. This is the reason that exemplary or punitive damages are often awarded in cases involving intentional harms such as assault.

As administered by juries, however, our current civil liability regime approaches the issue exactly backwards. In our current regime, large punitive damages verdicts are seldom awarded against non-corporate defendants. And I know of no one objecting to a punitive damages cap on the grounds that it will impair the deterrence of private individuals. Instead, large punitive damages verdicts are most typically awarded against corporate defendants who, as profit maximizers (a motivation often irrationally held against them), will be carefully responsive to compensatory damages. Corporate defendants need no punitive damages verdict to encourage them to take all cost-effective precautions to prevent injuries; compensatory damages alone achieve that result. Thus, the increasingly commonplace plaintiff lawyer's charge to a jury to ''send the defendant a signal'' ignore entirely the universally accepted academic view that, to a corporate defendant, full compensatory damages are not only an effective signal, but also the only and entire signal needed.

DO PUNITIVE DAMAGES HELP OR HURT CONSUMERS?

If the effect of punitive damages were to benefit consumers or if their effect were even neutral to the consumer interest, we might be unconcerned that punitive damages are unnecessary to deter corporate defendants from injurious behavior. The central problem of punitive damages, however, is that, except in the rare cases of jury undervaluation of damages or underlitigation, punitive damages settlements and verdicts affirmatively harm consumers, and low-income consumers most of all.

Where punitive damages become a commonplace of civil litigation as in Alabama, or even where they become a significant risk of business operations, consumers are harmed because expected punitive damages verdicts or settlements must be built into the price of products and services. The effect of the greater frequency and magnitude of punitive damages recoveries of modern times has been to increase the price level for all products and services provided in the U.S. economy. To observe this phenomenon is not to say that injured consumers should go uncompensated. If a consumer suffers an injury that can be attributed to some wrongful activity of a defendant, whether manufacturer or service provider, that consumer should receive compensation for economic losses and for reasonable non-economic losses, such as pain and suffering.[8] In contrast, punitive damages, by definition, go beyond the compensatory. The problem with the increasing commonality of large punitive damages verdicts and settlements, such as those we see in Alabama, is that the awards to some consumers of greater than compensatory damages must be built into the prices paid by all other consumers.

It is an obvious implication of this proposition that low-income consumers are most seriously harmed by our current damages regime. First, low-income consumers have less money generally and, regardless of the product or service, are more seriously affected in terms of the purchasing power of their limited resources where the price level increases. Secondly, and most importantly, low-income consumers are not the typical beneficiaries of large punitive damages verdicts or settlements, surely not on a systematic basis. Again, research of my own currently in progress shows that low-income consumers, if injured, are less likely to seek an attorney; even with an attorney, are less likely to sue; less likely to recover; and, again by definition, less likely to recover large damage judgments since their lost income is typically low and pain and suffering awards, which are highly correlated with lost income, equally low.

Put more simply, where punitive damages verdicts and settlements are frequent and large, low-income consumers are forced to subsidize the high-incomes as expected punitive damages awards are built into the prices of products and services. Occasionally, a low-income individual will receive a punitive damages windfall, but the far more systematic effect is to harm the low-income as the prices of products and services generally are increased as producers must adjust for the expectation of future punitive damages payouts.

Although these Hearings are chiefly directed to punitive damages reforms, it is important to recognize that the current effect of the doctrine of joint and several liability is similar. Joint and several liability has its most general effect on organizations or entities which engage in a large scope of activities, such as state and municipal governmental entities, public utilities, and the like. It has become a commonplace of modern civil litigation for plaintiffs' attorneys to join as defendants any governmental entity or utility remotely associated with an injury. Thus, state governments and municipalities are joined as defendants on claims

that roads were misdesigned or poorly maintained or that a guard rail or telephone pole could have been placed in a better position. Forty years ago, attorneys would not have thought to include entities whose causal relationship to the harm was so low or, if they had attempted to join such entities, the claim would have been dismissed. Today, such litigation is routine and imposes substantial litigation expenses upon our state and municipal governments and liability expenses, only infrequently, but chiefly under operation of the doctrine of joint and several liability where the truly responsible defendants have gone bankrupt, leaving our governments and utilities to suffer the remaining judgment.

It is clear that, for very similar reasons, operation of the doctrine of joint and several liability harms citizens in general, but low-income citizens most of all. Damages judgments must be paid from state and municipal financial sources. It is well-established that state and, especially, municipal finance is seriously regressive in effect, charging more to middle- and low-income citizens, proportionate to income, than to the relatively high-income. This effect, most obviously, is not limited to the product manufacture context and provides an important independent reason why the reforms the Senate is considering should be expanded beyond application to products manufacture to all civil litigation.

These propositions about the effect of punitive damages and joint and several liability on the poor and low-income may appear abstract, though I believe that they are generally accepted within the academic community. To illustrate their import with greater salience, however, I would like to present one recent example of a punitive damages verdict in Alabama, indeed, a case that inspired the research presented above. The case will both show the pressing need for punitive damages reform, again, not limited to products liability, but expanded to all state and federal litigation.

In the case Gallant v. Prudential, decided this past April 1994, Iran and Leslie Gallant sued Prudential Life Insurance Company based on the actions of a Prudential agent. The Gallant's had purchased a combination life insurance-annuity policy with a $25,000 face value at a monthly premium of roughly $39.00. At the time of sale, the agent had told them that the value of the annuity was roughly twice what in fact it was; the agent had added together the table indicating ''Projected Return'' with the table indicating the lower ''Guaranteed Return.'' A jury found this action fraudulent and held the agent liable and Prudential separately liable for failing to better supervise the agent.

Fortunately, the problem was discovered before either the policyholder had died or had retired to receive the annuity. Thus, to the time of trial, there was no true economic loss beyond the failed expectation of the larger future return. I have carefully read the transcript of the testimony, and the Gallants testified that, between the time that they discovered the misinformation and Prudential called them to offer a remedy (Prudential offered to return their premiums or to discuss adjusting the policy), they had suffered roughly two weeks of sleepless nights and substantial anger at having been misled. That was the extent of their ''mental anguish''.

Twenty years ago, I taught cases of this nature in a course entitled Restitution, in which the appropriate remedy was restitution of all paid premiums or out-of-pocket costs. On very rare occasions such as especially egregious actions by a defendant, some courts considered awarding plaintiffs the benefit of the bargain, say, by increasing their annuity benefits.

Our modern world has changed: After a one and one-half day trial, an Alabama jury awarded the Gallants damages equal to $30,000 in economic loss; $400,000 in mental anguish; and $25 million in punitive damages. Again, the face value of the insurance policy was only $25,000.

I do not wish to minimize the harm to the Gallants, especially the indignity of the misrepresentation, nor to condone the fraudulent actions of the agent, apparently perpetrated on several other Alabama citizens who recovered separately. Nevertheless, there is not a single person to whom I have described this case—not an attorney, whether plaintiff or defendant; not a liberal or a conservative; not even a radical or idealistic Yale Law student (or faculty member)—who has not been shocked by the outcome or who could defend it as a rational or sensible verdict in the context of the harm. Again, many defenders of punitive damages argue that exceptionally large verdicts are usually overturned on appeal. Alabama provides a review procedure for punitive damages verdicts that the U.S. Supreme Court has approved.[9] In the Gallant case, however, the judge conducting the review affirmed the $25 million award in its entirey, though directing part of the amount to be paid to the State.

What will be the effect of a punitive damages verdict of this nature? The Gallants appear to be persons of modest means (before the verdict). Does a verdict of this nature help middle- or low-income consumers? Totally, the opposite. The insurance policy in question—face value, $25,000—was the cheapest form of life insurance/annuity available on the market; again, its monthly premium was only $39.00. Obviously, at such a premium, the insurance carrier could not be expecting to make a substantial profit on the policy. Indeed, an expert in the case estimated that over the entire life of the policy, the premiums net of payouts paid by the Gallants would increase Prudential's assets by only $46.00.[10] Prudential, like most other life insurance companies, profit more substantially from large dollar, rather than small dollar policies. The expert estimated that the verdict reduced dividends to every Alabama policyholder (Prudential is a mutual carrier) by $323.

How do we analyze a case like this in terms of whether punitive damages serve a necessary deterrent effect? In his closing arguments, the (highly effective) attorney for the Gallants asked the jury to determine a level of damages that would send a ''message'' to the giant Prudential Life Insurance Company that fraudulent behavior on the part of an agent will not be tolerated.[11] What kind of damages message is necessary to achieve that effect? Obviously, if the insurer stood to gain no more than $46 over the life of the policy, any damages judgment greater than $46 sends the insurer a message by making the policy unprofitable. (Of course, I ignore entirely Prudential's defense costs plus the reputational harm from the lawsuit.) The jury in the Gallant case went substantially beyond that amount, however, in awarding compensatory damages of $30,000 for economic loss and $400,000 for the mental anguish of the two weeks' lost sleep and anger. It certainly cannot be argued that the jury has undervalued the Gallant's compensatory loss—indeed, the $400,000 mental anguish award is extreme. Furthermore, there is no reason to think that the agent's behavior in other contexts would go undetected. (Prudential later settled other cases brought by the agent's clients.) As a consequence, there is no justification for a punitive damages award whatsoever.

What will be the effect of punitive damages verdicts such as that in the Gallant case? In the face of such a verdict, what is the rational response of an insurer like Prudential or other insurers selling similar policies? Regrettably, but necessarily in a competitive industry, the rational response is to quit selling such low value policies altogether. It makes very little sense to expose the company and its policyholders to the risk of such a damages verdict given the very small gain from the sale of such a policy.

Is this the type of product that our civil liability system should drive from the market? Obviously, not, and low-income consumers in Alabama are directly harmed as a result. Here, the dramatically differential effects of such verdicts on high-income versus low-income consumers are made clear. In my own view, it is far more important to our society to have our insurance industry provide life insurance coverage to low-income than to high-income citizens, since the relatively affluent of our society have other means of providing financial security for their families. The availability of financial protection and security at relatively low cost will be substantially diminished if such low premium policies, as here, are no longer available.

More generally, where expected punitive damages verdicts are added to the price of products and services, the first to feel the effect will be low-income consumers. And where the magnitude of punitive damages verdicts rise, imperiling the continued provision of the product or service, the first to be affected will be those products and services with the lowest profit margins, most attractive to the low-income. The Gallant case provides a dramatic example of the effect. Following Gallant and other large punitive damages verdicts, several insurers have quit offering coverage in Alabama altogether.

Punitive damages reform would cure that ill to the benefit of all Americans and especially low-income Americans. As the Gallant case shows, however, to fully cure the problem, punitive damages reform must extend beyond the products liability context to all civil litigation. The Gallant case involved insurance, not product manufacture, Punitive damages verdicts such as the $25 million verdict in the Gallant case encourage wasteful litigation. (Indeed, litigation seeking punitive damages judgments against financial service companies has become an industry in Alabama.) By increasing the prices of all products and services, punitive damages verdicts and settlements reduce the purchasing power of all Americans, again, especially the poor.

MUST CONGRESS IMPLEMENT PUNITIVE DAMAGES REFORM?

Many defenders of our current regime question why the Congress should become involved in civil liability reform, rather than leaving reform initiatives to the courts or to the state legislatures. The question is particularly appropriate with respect to punitive damages reform, given that the Supreme Court has addressed the issue of the excessiveness of punitive damages in several recent cases.[12]

I have been involved in the tort reform effort for many years and have testified in favor of tort reform before various state legislatures (California, Louisiana, New Jersey) and in various judicial proceedings evaluating state tort reform statutes (Alabama, Florida, New Mexico). I have organized several conferences addressing tort reform for state legislators and judges, and have directed much of my writing on tort reform to the judiciary.

This varied experience has convinced me that only Congress is in a position to implement effective civil liability reform and, especially, punitive damages reform. First, it is evident, after many opportunities, that the Supreme Court has great difficulty proceeding beyond what might be called a ''procedural'' approach to the punitive damages problem. The Court's various options suggest clearly that a majority of Justices are concerned about the excessiveness of modern punitive damages verdicts. To date, however, the only form of punitive damages control that the Court has adopted has been procedural: approving a set of procedures at the state level for judicial review of punitive damages verdicts (Haslip, supra) or disapproving a state judicial procedure as not providing sufficient review (Oberg, supra).

In my view, a merely procedural approach to the punitive damages problem will never be successful. Indeed, we have stark evidence of its failure. In 1991 in the Haslip case, the Supreme Court specifically approved the procedure for reviewing punitive damages verdicts for excessiveness adopted by the Alabama Supreme Court.[13] Viewing the Alabama procedure on its face, few can contest that the review procedure appears reasonable. In practice, however, as the Gallant case proves and as the statistics from the rural Alabama counties strongly suggest, the punitive damages problem in Alabama, under the procedures approved by the U.S. Supreme Court, has grown to epidemic proportions.

Upon reflection, it is not surprising that the Supreme Court has found it difficult to deal with excessive punitive damages. The Supreme Court's job, in general, is to define rights. Few would contest—I do not contest—that punitive damages may be appropriate in some contexts. I would not support a Constitutional right of immunity from punitive damages (though that may well be an important improvement over the current state of the law).

What is needed for punitive damages reform is a prudential judgment of the appropriate cap or limit to punitive damages that will allow some room for punishing egregious behavior, but constrain the deleterious effects of unlimited punitive damages judgments on consumers and on the low-income. A proportional limit of three times economic losses or $250,000 is a prudential judgment of that nature. (Personally, I would support a lower figure absent a definitive finding of malice.) But that prudential judgment is a uniquely legislative, not judicial, exercise.

With respect to reform by the states, the question is somewhat different. Punitive damages verdicts implicate both interstate and foreign commerce in a manner that only the federal Congress can address. Some have argued that a state without a significant manufacturing or interstate service sector could actually benefit its citizens by adopting an expansive civil liability regime at the expense of citizens of other states. Only the federal Congress can address this issue.

Secondly, there is one further effect of our modern damages regime that should not go unnoticed in Congress: an effect on the competitiveness of American manufacturers and producers. Some have argued that large punitive damages verdicts in the U.S. are neutral with respect to competitiveness since foreign courts do not award such verdicts against U.S. producers with respect to sales abroad and because foreign producers are equally subject to such verdicts for sales in the U.S. Thus, for U.S. sales, foreign producers, just like U.S. producers, must add expected punitive damages and joint and several liability verdicts into the prices of products and services. (It is often lost on these observers that an increase in prices on account of punitive damages—even if operating neutrally—is not an affirmative argument on behalf of consumers.)

This analysis, however, is only partially correct. Increasingly, foreign courts are refusing to enforce extraordinary judgments from U.S. courts against foreign defendants. For example, very recently the German Federal Court of Justice (Germany's highest court for civil and commercial matters) refused to enforce a $400,000 punitive damages verdict obtained in an American court by an American plaintiff against a German defendant on the grounds that the punitive damages verdict was inconsistent with German public policy.[14] In the same case, an intermediate court had reduced the pain and suffering damages component from $200,000 to $70,000 on the same grounds.

Foreign judgments of this nature should be alarming both to Congress and to U.S. courts. First, they are strong evidence that the current course of American law does not command wide assent—itself another reason for Congress to enact general punitive damages reform. Secondly, however, such judgments suggest an increasing competitiveness problem facing U.S. producers here in the U.S. To the extent that U.S. verdicts must be enforced abroad, foreign producers need not add the costs of the U.S. civil justice system, including punitive damages and excessive pain and suffering awards, into the prices of products and services sold in the U.S. Thus, foreign producers can underprice U.S. producers in sales to American consumers here in the U.S.

Ironically, although U.S. producers and their employees are harmed by this effect, U.S. consumers benefit because they can obtain products and services at lower prices, without the effects of our punitive damages verdicts built in. Put slightly differently, the refusal of foreign courts to enforce large punitive damages or pain and suffering awards from U.S. courts represents a type of tort reform, regrettably however, only available—prior to federal punitive damages reform—to foreign, rather than to U.S., producers.

For these various reasons, I endorse punitive damages reform. May I emphasize again the necessity of extending reform to all civil litigation, state and federal, rather than limiting it to products liability or some other subset, in order to spread the benefits of reform most broadly.

There are a wide range of punitive damages reforms that the Senate might consider. Most important would be a proportionality limit on available punitive damages. The proposed limit of three times economic losses or $250,000 is a reasonable first start, though strong arguments can be made for lower limits or more rigorous standards requiring a finding of actual malice before any exemplary damage award can be made. It would also be helpful to provide for the bifurcation of trial as between the compensatory and punitive damages phase, in order that the often highly-inflammatory evidence concerning defendant (most often, corporate) wealth does not taint a jury's evaluation of the basic evidence with respect to liability. It is also important to place limits on or give credit to defendants facing multiple punitive damages awards. The tragic modern experience in the asbestos litigation demonstrates the problem. Here, because of multiple punitive awards to sets of plaintiffs reaching court first, many subsequent claimants have been unable to collect basic compensatory damages of any amount.

These comments address only current proposals. Again, I have studied the reform of modern tort law for many years and would be happy to respond to any questions concerning the full range of modern tort law reform.

FOOTNOTES

[1] See, e.g., Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973); G.L. Priest, Selective Characteristics of Litigation, 9 J. Legal Stud. 399 (1980).

[2] G.L. Priest, Private Litigants and the Court Congestion Problem, 69 B.U.L. Rev. 527, Table 1 at 540 (1989).

[3] These data were collected under a research project organized and directed by myself and Professor James R. Barth, Auburn University for the case *Gallant* v. *Prudential.* Publication is in process; the data are available from the author.

[4] This figure excludes wrongful death awards which are denominated ''punitive'' in Alabama. If such awards were included, the amount equals $109 million, equal to $26 per capita.

[5] For a discussion of the development of modern tort law, G.L. Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud, 461 (1985).

[6] Richard A. Posner, Economic Analysis of Law (4th ed., 1992).

[7] Of course, this is also a justification for the class action.

[8] I have written widely on the subject of appropriate pain and suffering awards, and would strongly endorse limits on pain and suffering, though this issue is somewhat beyond the focus on punitive damages here. See, e.g., G.L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987).

[9] *Pacific Mutual Life Insurance Co.* v. *Haslip,* 111 S.Ct. 1032 (1991).

[10] Testimony of Professor James R. Barth, Auburn University.

[11] *Gallant* v. *Prudential,* Barbour County, Alabama, Trial Transcript at 647, April 6, 1994.

[12] See, e.g., *Pacific Mutual Life Insurance Co.* v. *Haslip,* 111 S.Ct. 1932 (1991); *TXO Production Corp.* v. *Alliance Resources Corp.,* 113 S.Ct. 2711 (1993), *Honda Motor Co.* v. *Oberg,* 114 S.Ct. 2331 (1994).

[13] *Pacific Mutual Life Insurance Co* v. *Haslip,*. 111 S.Ct. 1032 (1991).

[14] Judgment of June 4, 1992, BGH Gr. Sen. Z., discussed in G.L. Priest, Lawyers, Liability and Law Reform: Effects on American Economic Growth and Trade Competitiveness, 71 U. Denver L. Rev. 115 at 146–47 (1993).

MCCONNELL AMENDMENT TO H.R. 956, PRODUCT LIABILITY FAIRNESS ACT

Mr. HATCH. Mr. President, there is a subtle implication in this whole debate on the McConnell amendment—an amendment which I strongly support—that somehow health care providers are a bunch of greedy so and so's, motivated solely by dreams of maximizing profit.

If they ask for relief from liability, it must be because they want to escape responsibility, to make a quick buck, not because it would make our health care delivery system better.

What is ironic is that this body has spent countless hours over the past 2 years debating proposals on health care reform, all of which were based on a system which places the utmost trust in the health care professional, whether it be a doctor, a nurse, a chiropractor, or a lab technician.

In fact, we spent countless hours here in this very Chamber, debating how to improve our health care delivery system. We spent 54 days in the Labor and Human Resources Committee—46 days in hearings and 8 days in markup—and 40 days in the Finance Committee—36 days in hearings, and 4 days in markup. And that does not even count the countless hours of work outside the committee and on the floor.

There was no disagreement over the need for medical liability reform. Indeed, the Clinton proposal, the Labor

Committee bill, the Finance Committee bill, the ensuing Mitchell bill—all contained medical liability provisions, as I will discuss later. The only question was over what those proposals should be.

When we get sick, who do we see? A doctor, a nurse practitioner, or another health care professional. Not an attorney.

When our children get sick, who do they see? A pediatrician, a physician assistant, or another health care provider. Not an attorney.

Our entire medical system—which everyone knows is heralded as the best in the world—is based on a total reliance on the abilities of the health care professionals who treat us, professionals who have scarified immeasurably to get the requisite training and credentialing. These are professionals who spend long and hard hours in school and at work to make our system the best in the world.

Will there be mistakes?

Of course there will. After all, we are only human. And while we must drive for perfection, that by definition cannot be.

My heart goes out to each and every person who has suffered an adverse medical event, whether it were caused by the delivery system or not.

I wish we could have a perfect health care delivery system, where everyone was healthy and no one ever was ill or suffering.

I wish this could be a perfect world in which children never suffered adverse reactions from the very vaccines designed to protect them.

I wish this could be a perfect world in which a surgeon never removed the wrong eye, or the wrong kidney. But it is not a perfect world, nor can it ever be.

I was a trial attorney before I came to the Congress.

I saw heart-wrenching cases in which mistakes were made. I saw heart-wrenching cases in which mistakes were not made, and doctors were forced to expend valuable time and resources defending themselves against frivolous lawsuits.

I have litigated these cases, both as an attorney for the plaintiff and as an attorney for the defendant.

No one in this body knows better than I—perhaps with the exception of our colleague from Tennessee, Senator FRIST—what the defects are in this system.

Mr. President, there are over 260 million people in these United States. I wish we could design a system which would protect each and every one of them from harm, but that is not possible. Our job is to design the best system we can.

Several of our colleagues came to the floor last week and gave very heart-felt statements, citing specific cases in which patients had not had the outcome we all would have liked.

I pray that these cases could have turned out for the better. I fervently wish that such problems never occur again.

But in a country as large and as diverse as this one, problems are inevitable. The task before us is to make sure the system minimizes those problems.

I ask my colleagues: ''Do we have the best system possible?''

I do not believe any one in this Chamber would argue that is so.

Thus, the question before is how to design a system which protects both the patient and the provider. I do not believe that a protracted war between trial attorneys and health care professionals is the way to accomplish that goal.

My experience indicates that the best way for us to pass solid legislation which really solves a problem is for both sides to come together and negotiate a solution. Unfortunately, that has not been the case to date. And I think our debate, and indeed our country, has suffered because of this.

Nevertheless, the intransigence of one or more parties is no reason that we should cast aside consideration of one of the most important issues that has faced this body since I came to the Senate.

Indeed, I first introduced a medical liability bill in this body in 1978. Many of the approaches embodied in my legislation are also contained in the McConnell-Kassebaum amendment before us today.

THE NEED FOR HEALTH CARE LIABILITY REFORM

What are the problems which give rise to the need for the McConnell amendment? Let me list them for my colleagues:

First, medical liability costs are out of control. A significant portion of our gross domestic product is devoted to tort costs, of which medical torts are a large part. This number is growing.

As our distinguished House colleague, Representative DAVE MCINTOSH, noted in an April 1994 ''Hudson Briefing Paper,'' the United States has the most expensive tort system in the world, with direct tort liability costs of 2.3 percent of the gross domestic product. Our colleague went on to note that whereas U.S. economic output grew 100 percent between 1933 and 1991, tort costs grew almost 400 percent. In other words, over the past 58 years, tort costs have grown almost four times faster than the U.S. economy.

In that briefing paper, which I commend to my colleagues, Mr. MCINTOSH found that 7 percent of America's tort costs—$9.1 billion—are associated with medical malpractice claims. As Senator MCCONNELL, the author of this amendment, said last Thursday, according to the AMA physician masterfile and other AMA liability data, the average rate of claims has increased every year since 1987. In fact, as Senator MCCONNELL noted, the AMA data show that in 1992, 33,424 medical professional liability claims were filed. The next year, 1993, 38,430 claims were filed, a 28-percent jump from one year to the next.

Second, liability insurance costs are having a direct impact on health care spending. Professional liability insurance rates are rising in response to our runaway tort system. The estimated annual cost of liability insurance for physicians and health care facilities, for example, was calculated at more than $9 billion in 1992, and it continues to grow.

We have all heard the statistics cited in our debate on the amendment by our distinguished colleague from Wyoming, Senator THOMAS.

The costs of ob-gyn malpractice claims in particular are having a very serious impact on both professional liability costs and the patient's bill. Statistics from the American College of Obstetricians and Gynecologists show that one out of eight ob-gyn's has dropped obstetrical practice due to liability concerns. A 1990 OTA report indicated that more than half a million rural residents are without any ob services at all, a number which has undoubtedly grown since the report was issued.

Third, health care liability costs raise the costs of health care. The explosion in medical liability claims diverts resources which could be used for patient care, and it raises the per patient cost of health care.

As Federation of American Health Systems President Tom Scully noted at a March 28 Labor Committee hearing, the total yearly cost of medical liability insurance is $9.2 billion. He went on to relate that that, added to Lewin-VHI estimates of defensive medicine, as I will discuss in a minute, plus the liability costs borne by manufacturers of drugs and devices—$10.8 billion a year—could total up to $45 billion a year. And that does not even include settlements. Clearly, even if these estimates are off a bit, we are talking about a substantial sum involved in the cases.

Fourth, defensive medicine contributes to increased health care spending. Health care professionals, fearing lawsuits, perform more services and order more tests than they would otherwise would.

I know about that. As a former medical malpractice lawyer, one of the bits of advice I would give to doctors was you cannot afford to not list every possibility in your health history. You cannot afford to not try everything you possibly can to make sure that that simple cold is not a respiratory disease, blood disorder or any number of other things. You have to make sure of your history because no longer can you get by just meeting the standard of practice in the community. You better be way above and beyond that. And in the process, the cost of health care has gone up exponentially because doctors must now protect themselves, against medical liability cases, and I cannot blame them. The only way to stop it is to get some reason into the system.

This issue has been one of the more hotly contested in the medical liability debate.

In fact, a few years ago, Ways and means Chairman BILL ARCHER and I asked the Office of Technology Assessment to conduct a study on defensive medicine. The results embodied in a July 1994 report were not as conclusive as we would have liked. As OTA admitted, ''Accurate measurement of the extent of this phenomenon (defensive medicine) is virtually impossible.''

However, Lewin-VHI, one of the leading analysts in the whole field, has estimated that the combined cost of hospitals' and physicians' defensive practices was $25 billion in 1991, and that study was based on what was considered to be a very conservative definition of ''defensive.''

In fact, the Hudson Institute Competitiveness Center study I cited earlier found that liability premiums and defensive medical practices contributed $450 per patient admitted to a large urban hospital in Indiana, an average of 5.3 percent of the patient's hospital bill. Of that amount, $327 went for defensive medicine practices, and $123 went for insurance and administrative costs.

But, Mr. President, I do not believe you need the results of a study to realize that there is defensive medicine and that it costs a lot of money.

I have a very simple gauge. Ask your doctor or other health care professional the next time you have an office visit. They will confirm: defensive medicine is real.

In fact, you do not have to even wait for your next visit. Ask our colleague from Tennessee, Senator FRIST. In a very compelling statement before this body last week, he said:

> As a physician, I have seen first-hand on a daily basis the threat of litigation and what it has done to American medicine.
>
> I have watched my medical colleagues order diagnostic tests that were costly and unnecessary to the diagnosis or to the care of the patient, and they are ordered for one purpose: To create a trail—in many cases a paper trail—to protect them in the event a lawsuit were ever to be filed.
>
> It is called defensive medicine and it happens every day in every hospital in America. It alters the way medicine is practiced, and it is wasteful.

He could not have said it better. In fact, some scholars and leaders say that if the American Medical Association admits to $25 to $30 billion a year in defensive medicine, can you imagine how really high it must be? We have to get a handle on this.

Fifth, a significant portion of these tort awards never make it to the plaintiff. Despite all these tremendous litigation costs, the beneficiaries seem to be lawyers, not patients.

Lawyers should be compensated and they should be fairly and reasonably compensated. But studies have shown anywhere from 28 to 43 percent of every dollar spent on liability litigation ever reaches patients. That is a strong indication that our liability system has been turned squarely on its head.

There are lawyers in some States who set up separate corporations to provide for documentary evidence or exhibits or designs and pictures and other matters. Sometimes total costs taken out of these suits can go as high as 60 percent of the money before any of it ever reaches the patient. Now, I think that is outrageous in some of these States. But I am aware of some of these things that go on. These lawyers are just making a killing off some of these cases. I will never deny or begrudge any lawyer the right to make a fair compensation for what happens to be a very difficult and skillful trial or even a case. But there are limits to everything, and that is why this bill is providing some additional limits that would help all of us to save and conserve on medical costs.

Sixth, the liability crisis has limited the public's access to, and confidence in, health care. An Insurance Information Institute report in May of last year cited that a 1992 survey of obstetricians and gynecologists showed that 80 percent has been sued. Is it likely that 80 percent of obstetricians and gynecologists are committing malpractice? I do not think so.

The results of this are obvious. A survey conducted by the American College of Obstetricians and Gynecologists showed that one out of eight physicians specializing in pregnancy-related services stopped delivering babies because of liability concerns, and, I might add, the cost of malpractice insurance.

A New York Times article from July of 1993 said that as many as 17 percent of obstetricians and 70 percent of family practitioners who once delivered babies in New York no longer do so.

I ask my colleagues, is the goal of access to care helped by a system that drives providers out of certain areas or types of practice?

I ask my colleagues, does a system which creates these disincentives to patient care instill public confidence in providers?

In each case, I think the answer is a resounding ''no.'' Senators MCCONNELL and KASSEBAUM have provided us with a solution.

The vulnerability of both health care payers and health care providers to claims arising from the liability morass is not an abstract proposition.

According to Lewin-VHI, comprehensive medical liability reform would save $4.5 billion in year one, and an estimated $35.8 billion over 5 years, by curbing both the costs of premiums and of defensive medical practices.

The McConnell amendment, modeled after the Health Care Liability Reform and Quality Assurance Act of 1995 (S. 454), which I strongly support, would instill a much needed measure of stability into our legal lottery and benefit both patient and provider. How?

Statute of limitations: First, the proposal includes a 2-year statute of limitations for health care liability actions. A claim must be filed within 2 years of the date on which the claimant discovered or, in the exercise of reasonable care, should have discovered the injury and its cause. This is similar to a provision contained in S. 672, my Civil Justice Fairness Act.

It is also similar to the law in Utah, which provides for a 2-year statute of limitations, with a 4-year maximum.

Punitive damages reform: Second, the McConnell amendment sets standards for punitive damages awards. In order for a claimant to receive such damages, he or she must prove by clear and convincing evidence that:

The defendant intended to injure the claimant for a reason unrelated to health care;

The defendant understood the claimant was substantially certain to suffer unnecessary injury and yet still deliberately failed to avoid such injury; or

The defendant acted with a conscious, flagrant disregard of a substantial and unjustifiable risk of unnecessary injury, which the defendant failed to avoid in a manner which constitutes a gross deviation from the normal standard of conduct.

Further, the amendment precludes punitive damages awards only if compensatory damages are more than nominal.

One of the strong points of the amendment is that it sets up standards for punitive damages. Any defendant may request separate proceedings on either punitive damages liability or the amount of the award. There is a proportionality requirement, so that no award will exceed three times the amount awarded for economic damages or $250,000, whichever is greater.

Finally, there is an important safeguard contained in the McConnell amendment, so that it is made clear the language does not imply a right to seek punitive damages if none currently exists under Federal or State law.

Again, this language is very similar to the language in my bill S. 672.

Periodic payments: Under the McConnell amendment, periodic payment of future damages can be made at the request of either party if the award exceeds $100,000. This is an important provision which ensures that the injured party will receive more of the award, and the attorney less. It also makes it easier for insurers to judge their appropriate reserves.

This provision was also contained in my Civil Justice Fairness Act. I would note that in Utah law, periodic payments for awards of over $100,000 are mandatory.

Limits on attorney fees: The amendment before us limits attorney fees to 33⅓ percent of the first $150,000, based on after tax-recovery, and 25 percent of any amount in excess of $150,000. Although my bill this year addresses attorney fees from a different perspective, I would note that last year the

Labor and Human Resources Committee adopted an amendment I offered to cap attorney's fees at 25 percent across the board.

I have to say, I am concerned about any limitation on attorney's fees, but there have been some colossal rip-offs in this area and this appears to be a reasonable approach in the McConnell-Kassebaum amendment.

Finally, I want to mention two other important provisions in the McConnell-Kassebaum amendment.

Alternative dispute resolution [ADR] mechanisms: I have long felt that our fault-based liability system may not be the most equitable or the most efficient. It is expensive, time consuming, and unpredictable.

The McConnell-Kassebaum bill encourages States to establish or maintain alternative dispute resolution systems. It also requires the Attorney General, in consultation with the Administrative Conference of the United States, to develop guidelines for State ADR procedures, including:

Arbitration; mediation; early neutral evaluation; early offer and recovery mechanisms; certificate of merit; and no-fault.

Further, the provision authorizes the Attorney General to provide States with technical assistance in establishing and maintaining such ADR systems. The AG is required to monitor and evaluate the effectiveness of these systems.

I believe that these provisions will be very helpful in encouraging alternatives to our current system. However, I am concerned that the language does not go far enough in encouraging the development of such systems.

For example, at least two States, Colorado and Utah, are developing no-fault liability systems. No-fault may hold great promise in rectifying many of the problems with a fault-based system, such as its unpredictability and cost, but we are far from designing a system which will work perfectly.

Later in this debate, I plan to offer an amendment authorizing the Attorney General to assist States to help develop the ADR programs which are authorized in the McConnell amendment.

On measures to improve quality; when I began this statement, I talked about efforts to improve our health care delivery system, and, in particular, the quality of care that patients receive.

There are myriad safeguards in our system to ensure that we strive for quality care.

Physicians are credentialed by the hospitals at which they practice to ensure that the medical staff both has the appropriate training, experience, insurance coverage, and is utilizing their skills appropriately. Peer review protects against problems with patient care as do the many activities of local and State medical societies.

All U.S. medical schools are accredited by one of three organizations sponsored and supported by the American Medical Association. In addition, all medical school graduates must pass the U.S. Medical Licensing Examination and almost all voluntarily choose to become board certified.

The Joint Commission on the Accreditation of Healthcare Organizations [JCAHO] accredits most of the hospitals in the United States. Hospital insurors monitor the care at the facilities they cover as well.

Finally, I would also note that according to statistics provided to me by the Federation of State Medical Boards, State medical board authorities disciplined 3,685 physicians in 1994, representing an 11.8-percent increase over the previous year. Almost 86 percent of those actions involved loss of license or some restriction of license.

By the way, I want to recognize that the States are also moving to improve health care quality.

In my own State of Utah, the legislature in January of this year enacted the second phase of Governor Leavitt's HealthPrint health reform program.

The act established a 2-year demonstration program to promote and monitor quality health care. Specifically, the law requires that the project include a collaborative public-private effort to promote clinical quality and cost effectiveness through community-wide continuous quality improvement methods. It also requires a process for evaluating the effectiveness of health care continuous quality improvement in the State of Utah.

Some have alleged that this system is not tight enough to guard against problem practitioners.

That may be the case. For example, there is an impediment to physicians self-regulating themselves which is posed by our antitrust laws; that obstacle is something Chairman ARCHER and I attempted to address in our antitrust legislation last year. It is an issue I intend to pursue again this year.

But, obviously, out antitrust laws are not the entire answer.

The McConnell-Kassebaum amendment provides additional resources for State health care quality assurance and access activities. One-half of all punitive damage awards will be used for licensing, investigating, disciplining, and certifying health care professionals in a State or for reducing the malpractice-related costs for health care volunteers in medically underserved areas.

This is a common sense provision, and one which I believe should be adopted.

BIOMATERIALS LIABILITY

A very important provision contained in Senator MCCONNELL's original medical liability bill, S. 454, is not contained in this amendment as it is contained in the underlying Gorton substitute product liability bill. I am referring to the biomaterials liability legislation sponsored by my colleagues from Arizona, Senator MCCAIN and from Connecticut, Senator LIEBERMAN.

I am very supportive of this legislation. There is a real need for the Congress to take action to relieve raw materials suppliers from liability in finished medical products.

Last month, I received a letter from Dr. Don B. Olsen, director of the University of Utah Artificial Heart Laboratory. He cited a situation which points out precisely why the McCain-Lieberman language is needed.

In his letter to me, Dr. Olsen said:

> Perhaps you were informed about the recent patient at LDS Hospital who is on one of our devices awaiting cardiac transplantation. The patient is doing very well, after having been bed-ridden for about 11 days awaiting a heart transplant. ''As his health continued to deteriorate, he received an intraaortic balloon pump (manufactured from one of the polymers now pulled off the market) and this device was inadequate to support his failing heart. Dr. Long, Dr. Doty and myself then elected to replace his heart with the CardioWest pneumatic artificial heart developed at the University of Utah.

CardioWest is a not-for-profit corporation that has 42 of their pneumatically powered artificial hearts implanted in patients as a bridge to cardiac transplantation.

The problem is that large polymer manufacturers, who make the raw materials needed to produce the artificial heart, have stopped marketing the polymers due to liability concerns.

A large device manufacturer, facing similar liability concerns, has set up its own polymer plant to produce the materials needed for its own devices. They are working with the university in an attempt to reach an agreement to provide the polymers for the artificial heart. However, they are understandably reluctant to provide the materials without some liability protection. There again the liability problem has reared its head.

Here we have a renowned university designing literally lifesaving products which cannot be used because of liability concerns. This is a travesty.

The McCain-Lieberman language is needed to obviate such problems. Enactment of it cannot come to quickly.

HEALTH CARE REFORM REDUX?

In closing, Mr. President, I want to outline for my colleagues the road we have traveled in the past 2 years.

When the President and Mrs. Clinton transmitted their Health Security Act to Congress, they acknowledged that we do have a health care liability problem in this country.

The Clinton bill, while it did not contain caps on damages, contains provisions on collateral source reform, periodic payment of future damages, limits on attorneys' fees, and alternative dispute resolution mechanisms.

In the Labor Committee, we adopted provisions on collateral source reform, periodic payment of future damages, limits on attorneys' fees, and grants for alternative dispute resolution mechanisms, including no-fault.

Subsequently, in the Finance Committee, we adopted a measure which

contained a $250,000 cap on non-economic damages indexed to inflation, joint and several liability reform, use of punitive damage awards for quality improvement, limits on attorneys' fees, mandatory ADR, and grants for no-fault demonstration programs.

Obviously, none of these measures included all of the provisions of the Mcconnell proposal; at the same time, it is obvious that much of the ground we have covered in the past 2 weeks we have covered before, in that many of these provisions been advocated, indeed endorsed, by significant parties in our past health care reform debate.

CONCLUSION

Mr. President, what we are talking about here is improving our health care delivery system, by ending the legal lottery which threaten both patients and providers.

Some in this body have expressed opposition to the very fundamental changes espoused by my colleague from Kentucky and Kansas.

What I find ironic is that when the shoe is on the other foot, that is, the Government is the deep pocket not a practitioner, this body can move quickly to enact tort reforms far more radical than those we are discussing today.

I am referring to the 1992 amendments to the Federal Tort Claims Act—FTCA—amendments I supported, indeed helped pass—which relieved Community health centers from burdensome malpractice premiums.

In placing community health centers under the FTCA, Congress endorsed prohibiting punitive damages, allowing liability to be determined by a judge, not a jury, and capping contingency fees at 25 percent of a litigated claim or 20 percent of a settlement.

And, while we are on the subject of community health centers—a program I support fervently and which I hope can be expanded to help address the uninsured problem—I might mention another irony.

Many have stood in this Chamber and cited the statistic that malpractice claims only amount to 1 percent of our total health care bill.

With a national health care bill approaching almost $1 trillion, 1 percent amounts to almost $10 billion.

Think how we could expand access to health care by using those billions of dollars for a program so much more productive than litigation.

With current funding of $757 million, community, migrant and homeless centers provide care to almost 9 million people in 2,200 communities. They estimate that, incrementally, each additional $10 million they are provided would extend services to 100,000 people in 30–40 new communities.

Reforming our medical liability system and using those savings in community health centers would truly be health care reform in the first order of magnitude.

In closing, I wish to commend Senator MCCONNELL, Senator KASSEBAUM, and Senator LIEBERMAN for their efforts on this important topic.

I intend to continue working with them closely on this issue, as it is extremely important to health care in America.

AMENDMENT NO. 613 TO AMENDMENT NO. 603

(Purpose: To permit the Attorney General to award grants for establishing or maintaining alternative dispute resolution mechanisms)

Mr. HATCH. Mr. President, I ask unanimous consent that the pending amendment be temporarily set aside, and I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, the pending amendment is set aside.

The clerk will report.

The legislative clerk read as follows:

The Senator from Utah [Mr. HATCH] proposes an amendment numbered 613 to amendment No. 603.

Mr. HATCH. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

In section 20(d)(1), strike ''with technical assistance'' and insert ''with grants or other technical assistance''.

Mr. HATCH. Mr. President, one thing is clear from our debate over the past week.

While there are both proponents and opponents of the medical liability amendment before us, we all agree that the system is not perfect.

Specifically, many commentators have criticized our current liability system as compensating very few of those entitled to recovery and punishing the wrong providers.

And most of the money spent on liability goes to lawyers.

By a RAND estimate, 57 cents of every liability dollar goes to lawyers, leaving only 43 cents for injured patients.

Injured patients can wait years for a final judgment and eventual payment of the small percentage of their awards left to them by the lawyers and the system.

And doctors can have their reputations destroyed or lose their livelihood by a single lawsuit or even mere insurance costs. The results of tort litigation, particularly in jury cases, is so unpredictable that it has been called the liability lottery.

There must be a better way of compensating injured patients and punishing bad doctors without wasting so much time, money, and effort while getting such unpredictable and inconsistent results. There must be a more rational and efficient liability system.

As with so many things, innovative ideas are coming from the States. And, I believe, many more interesting new ideas can be developed in the States if we will allow them to experiment.

One idea, which some in Utah, and in other States like Colorado, have been investigating is the development of innovative no-fault medical liability systems. A no-fault system could compensate more injured patients more quickly than the litigation system.

It could be more effective at punishing those providers who do act culpably. It may be that a no-fault system could be not only more equitable, but more inexpensive.

Researchers at Harvard University, who have been working in this for years and who are working with those in Utah and Colorado suggest that these systems hold substantial promise on all these fronts.

But we need more experience with different alternative dispute resolution systems, such as no-fault, before we can be sure.

There are many other approaches being tried in various parts of the country that might help make the system more rational. In the last few years we have heard about innovative dispute resolution systems that encourage quick and fair settlements like early intervention and early offer models.

Practice guidelines and enterprise liability are also options that should be watched and studied to see if they will yield helpful results elsewhere.

Enhancing the evidentiary status of clinical practice guidelines could help the tort system move to judgment more quickly and efficiently, with more uniform results. And practice guidelines could also be an interesting method of developing more uniform standards of medical practice.

There are many forms of each of these approaches, and I think we can learn much from experimenting with various approaches in the States. I believe we should encourage the States and entities in the States to experiment so that we can see what approaches are most likely to lead to a more fair and efficient liability system.

The amendment I am offering to the McConnell-Kassebaum provision on medical liability is very simple.

In section 20, State-Based Alternative Dispute Resolution Mechanisms, the current language in subsection (d) authorizes the Attorney General to provide States with technical assistance in establishing or maintaining alternative dispute resolution mechanisms.

My amendment would expand that slightly, so that the Attorney General may provide grants or technical assistance to States in establishing or maintaining alternative dispute resolution systems.

The only change is the addition of the words ''grants or'', and I note that this would be entirely permissive.

While minor, it is an important change, because it will allow States, or their designees, to work on ADR alternatives, without time-consuming work which is potentially duplicative at the Federal level.

I hope this amendment can be adopted.

Mr. WELLSTONE addressed the Chair.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. Mr. President, I know my colleague from Illinois is shortly going to introduce an amendment that I will support, which gives States the right to opt out. I am in profound disagreement with this Federal preemption. I think I will respond to my colleague from Utah just with a somewhat different perspective for the record, if you will, Mr. President.

Mr. President, I remember last year during the health care debate when we had talked about the cost of medical malpractice premiums that both the Congressional Budget Office—I did not say Democrat or Republican—and the Office of Technology Assessment, which gets high remarks for its very rigorous work—indicated that the medical malpractice premiums account for less than 1 percent of the overall health care costs. A trillion-dollar industry, less than 1 percent.

As I remember, there were some other reports that said even if you were to take into account defensive medicine, altogether it was 2 percent of the total cost. By the same token, Mr. President, when the Congressional Budget Office, for example, and the General Accounting Office scored a single payer bill, where there was one single payer at each State level, as I remember, the estimates were that we could save up to $100 billion a year. But that challenged the power of the insurance industry. My understanding, Mr. President, is that medical malpractice insurance is the single most important profitable line of property casualty insurance and generated $1.4 billion in profit in 1992.

So we do not talk about insurance reform, record profits being made; we do not talk about how to really contain costs. The Congressional Budget Office also said, Mr. President, that the best single way of containing health care costs would be to put some limit on what insurance companies can charge. We do not do that at all. We go the path of least political resistance. Those folks have entirely too much economic and political power. We dare not confront them.

But, Mr. President, instead, we are going to go after those people who have been hurt, those people who have been injured, that have lost loved ones and take away some of their protection and take away some of their rights to seek redress of grievance.

Mr. President, I am going to go back to an example—I am sorry my colleague is not on the floor right now. I have a practice of not debating colleagues directly if they are not here. I do not think there is a standard of fairness to that. So I will be more general.

Let me raise the question about these caps on punitive damages. For example, I think my colleague wants caps across the board, as I understand it. Let me put a face on this question. Think of Lee Ann Gryc from my State of Minnesota who was 4 years old when the pajamas she was wearing ignited, leaving her with second- and third-degree burns over 20 percent of her body. An official with the company that made the pajamas had written a memo 14 years earlier stating that because the material they used was so flammable, the company was ''sitting on a powder keg.'' When Lee Ann sued for damages, the jury awarded $8,500 in economic damages and $1 million in punitive damages. By the way, children—earlier we were talking about this in debate, and one of my colleagues was making projections for economic damages for children—children do not get much by way of economic damages.

Let me ask you, Mr. President, as I cannot ask my colleague, was the jury wrong? Should the company have gotten away with a cap of $250,000 in punitive damages, as this bill would require? Unless you are comfortable answering the question yes, unless you are willing to say that Lee Ann Gryc was entitled to no more than $250,000 in punitive damages, when the company knew that the pajamas were flammable, then you should not be supporting this bill.

This legislation is going to have a very negative effect on consumers. I think it is unconscionable.

Now, Mr. President, I do not get a chance to ask the question, but I get a chance to present another perspective on the floor of the Senate right now in response to my colleague. The question I would raise is—I do not think my colleagues have an answer to this question—No. 1, if we have this cap on punitive damages, what is the projection on how many citizens are going to be denied, how much by way of compensation, over the years to come? And No. 2, what implications does this have toward weakening the deterrent effect?

Like it or not, Mr. President, the company that made those pajamas had a memo written 14 years earlier stating that it was sitting on a powder keg. But for this company the bottom line was the only line. Unfortunately, there are some companies like that—thank God, not too many. For those companies that produced these pajamas that are flammable that burn children, or products that injure or kill people, one of the ways we know they will not do it again is when they are slapped with such a stringent punitive damages suit that they know they cannot do it again. What is the effect of taking away that deterrent? What is the projection on how many innocent people are going to be injured, maimed, or killed by defective products in the foreseeable future? Give me near-term figures. Give me middle-term figures. Give me long-term figures.

Mr. President, what we have before us is an agenda that is an extreme. First of all, there is this agenda to, on the one hand, weaken some of the agencies which have as their mandate to protect the health and safety of consumers in this country. Then, on top of that, we try and take away from citizens their right to receive fair compensation.

I might add, when it comes to the cap on punitive damages, I think we essentially severely undercut the deterrent effect of this. That is why they are there. I mean, you have the economic and noneconomic damages to make the victim whole. In addition, you have punitive damages to say to a company: By God, you need to understand this is so egregious in what has been done that you really are slapped with a major damage which will prevent you from ever, ever doing this again and will prevent other companies from doing this again.

That is what we are attempting to overturn. That is what is so dangerous, no pun intended, for consumers in this country.

Mr. President, again, No. 1, for Lee Ann Gryc from the State of Minnesota, 4 years old when the pajamas she was wearing were ignited, leaving her with second- and third-degree burns over 20 percent of her body. Is $250,000 too much? Is any Senator willing to say it was too much? I do not think so.

Then my colleagues say, we cannot leave it up to a jury to decide. They are too swayed by emotion. The juries are the citizens that elect Senators.

Then, in addition, when my State of Minnesota decides that a cap on noneconomic damages did not work, we may not have any choice in the matter because we have legislation that preempts States. Whatever happened to decentralization? Whatever happened to the idea of States making some of these decisions?

Finally, Mr. President, again, on the medical malpractice part, I can simply say that I am not aware of any independent study done by CBO or Office of Technology Assessment since last year that went through the whole question of a $1 trillion industry, that went through medical costs, went through an analysis of health care costs.

What CBO and OTA said is 1 percent—medical malpractice premiums account for less than 1 percent of overall health care costs. Medical malpractice premiums account for less than 1 percent; adding defensive medicine, maybe 2 percent. Those are my figures as I remember.

When, in the name of controlling health care costs, are we going to pass a piece of legislation which is profoundly anticonsumer, which tips the scales of justice away from people who were seeking redress of grievance in behalf of negligent companies or negligent doctors? It is just outrageous. We take away from people some of the basic legal rights they have, some of the basic consumer protection they count on.

On the other hand, I would say to my colleagues, if we want to control health

care costs, great, I will give my colleagues an opportunity. Sometime I hope to bring an amendment on the floor that talks about putting a limit on insurance company premiums. Then we will see whether or not we are interested in controlling health care costs. According to the Congressional Budget Office, that is the way to control health care costs.

And I will say to my colleagues, if my colleagues are interested in having more health care in rural or urban communities, I am extremely interested in how we encourage more family doctors, nurse practitioners, and how we deliver health care in a humane, affordable way in underserved communities. But do not use these medical malpractice amendments as a reason to do that. We do not have to take away from citizens in this country protection when it comes to their health and safety. We do not have to take away from them their rights in the court system in order to make sure that we provide dignified, affordable health care. That is not a choice.

Mr. President, I hope on both the underlying product liability, and much less, some of these medical malpractice amendments—ones with caps—that colleagues will vote no. I yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SIMON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SIMON. Mr. President, I ask unanimous consent that amendment No. 613 be laid aside.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 614 TO AMENDMENT NO. 603

(Purpose: To clarify the preemption of State laws)

Mr. SIMON. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Illinois [Mr. SIMON], for himself and Mr. WELLSTONE, proposes an amendment numbered 614 to amendment No. 603.

Mr. SIMON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place insert the following:

SECTION . STATE OPTION.

(a) A provision of this subtitle shall not apply to disputes between citizens of the same State if such State enacts a statute—

(1) citing the authority of this section; and

(2) declaring the election of such State that such provision shall not apply to such disputes.

(b) If a dispute arises between citizens of two States that have elected not to apply a particular provision, ordinary choice of law principles shall apply.

(c) For purposes of this section, a corporation shall be deemed a citizen of its State of incorporation and of its principal place of business.

Mr. SIMON. Mr. President, this is word-for-word the amendment that the Presiding Officer offered in our Labor and Human Resources Committee, a very thoughtful amendment, which says we will permit the Federal Government to establish these standards, and if there is a litigation between a citizen of one State and a physician or hospital from another State, or whatever the circumstances may be, then these Federal standards apply. But if a State wishes to differ from this, a State can do that. That is all this amendment does. It was carried, as the Presiding Officer will recall, in a bipartisan vote in the Labor and Human Resources Committee. I hope it can pass in a bipartisan vote here.

I have some concerns about the basic product liability bill, but there can be a very cogent argument made for it, because if a manufacturer in Illinois or Michigan, or in some other State, manufactures a product, that goes interstate. So having some national standards makes some sense.

But in the case of medical malpractice, in all but a few cases we are talking about litigation within a State. And the argument made by Senator ABRAHAM in the committee seems to me to be a very logical argument, and that is, let us establish the Federal standards, but if a State wishes to vary from those standards, a State can do that. That is all the amendment does. It is not complicated. I will, at an appropriate time tomorrow, ask for a rollcall vote on the amendment.

I see my colleague from Washington is off the floor right now.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. GORTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GORTON. Mr. President, I would like to speak for a few moments on the underlying bill on product liability—the debate on which began a week ago today—on some aspects of the amendments which are before us at the present time on medical malpractice, and respond to two questions raised by the Senator from Minnesota during one of his sets of remarks on product liability earlier during the course of the day.

But I can begin in no better fashion than to share with you, Mr. President, and with my colleagues, a remarkably eloquent essay which appeared in last Friday's Washington Post. Its author, Bernadine Healy, was Director of the National Institutes of Health during most of the Bush administration and is a senior policy advisor at the Cleveland Clinic Foundation.

Mr. President, rather than simply to put that essay into the RECORD, in order that our Members, in making their judgments on the important votes they are going to cast tomorrow and the rest of the week, I intend to read that essay, because I was so moved by it, with simply the caveat in the beginning. The essay, entitled ''Tort Tax on Women's Health,'' is primarily about the impact of this bill and these amendments on women. And I trust, Mr. President, that you will remember, as I read it, that it speaks from Dr. Healy's female perspective. I am quoting and I will be until I bring this to an end:

As the move to fix the broken tort system gains steam in the Senate, we're hearing a tired refrain: Legal reform will hurt women. This political gimmick to paint women as victims is precisely the opposite of the truth: Perpetuation of the litigation lottery, not its reform, hurts most women in the long run.

In dire need of reform is the current system's imposition of massive and arbitrary fines under the guise of ''punitive damages.'' In product liability cases, punitive damages are intended to punish a company that manufactures a dangerous product. In medical malpractice cases, these fines are cloaked as non-economic damages, such as those for ''pain and suffering.''

Juries are asked to impose these damages on a purely subjective, emotional basis. They are in excess of the amounts needed to pay for the harm actually done. One juror told the Legal Times her reasons for awarding $10 million against a Washington, D.C. doctor and hospital: ''[Q]uite honestly, I think it had something to do with sounding like a round figure.''

It is this open-ended freedom to punish that creates a legal lottery, one in which many trial lawyers scoff at smaller claims in favor of the winning ticket of a million-dollar contingency fee.

How could reforming this system hurt women? Protectors of the current system claim that, because society places women at a lower economic value, economic compensation for an injury will never be enough. They point to lower wages for women than men in comparable jobs, as well as to the pathetically low wages identified for women who care for the children and home in a family.

Women always must stand firm for equal wages for equal work. We also must fight for economic respect for our work within the family unit. (This might even include calculating compensatory damages based on the total income of the family unit, not just the market value of domestic services). But our struggle for economic equality should not be used as a smokescreen to justify a liability system that threatens women's health.

Women live longer and suffer from chronic diseases (such as osteoporosis) to a greater extent than men. More than men, we will rely on new drugs and therapies to combat these debilitating diseases. Unfortunately, unpredictable and excessive product liability costs are forcing drug and medical device companies to withdraw needed products, or even to decline to develop them.

Some products used exclusively by women—namely, those for pregnancy and contraception—are particularly susceptible to withdrawal by companies fearing lawsuits. For example, the price of Bendectin, a drug approved by the FDA for morning sickness, skyrocketed 250 percent after lawsuits

alleged birth defects. Although no causal link to birth defects was ever found, the manufacturer withdrew the drug from the market. There are no other drugs for morning sickness.

Improvement to contraceptive products also have been stalled by the product liability system. While there was a need to compensate women for problems associated with the Dalkon Shield intrauterine device (which physicians—not lawsuits—first called to the attention of the FDA), the lengthy, hyperadversarial and profit-oriented stream of lawsuits seriously wounded the development and acceptance of an improved version. The same may become true for Norplant. Liability intimidation over minor problems in the first generation of this useful contraceptive may foreclosure the development of an updated version.

Another threat to women's health comes from the current medical malpractice system. The American College of Obstetricians and Gynecologists found that malpractice premiums increased 237 percent between 1982 and 1991. Added on are the indirect costs of defensive medicine (like too many Cesarean sections) and fewer doctors choosing to go into obstetrics.

No one pays a higher price for this system than the poor. The Institute of Medicine reports that physicians' fear of lawsuits has left many rural communities without obstetrical care. The National Council of Negro Women reports the same for urban low-income areas.

Who gains from this tort tax on women's health? Only 40 percent of malpractice insurance premiums goes to injured patients, while the remaining 60 percent goes to lawyers' fees and administrative costs.

Instead of health care by lottery, women need good science and the aggressive pursuit of medical advances by the NIH, academia and the private sector. We don't need women's advocates who protect a liability system that limits our health care choices by turning businesses away from women's health.

Nor do we need the same people who rightly argue for women to pilot F–16s then to characterize us as too delicate to weight our health risks. It is time to recognize that women, armed with solid research and medical information, can make their own intelligent choices about their health, from choosing a contraceptive to getting breast implants.

During the House debate, a congresswoman characterized liability reform as a male conspiracy, comparing the ''second-class status'' of non-economic damages under a reformed system to what she viewed as a ''second-class status'' for women. But just as women's health has finally been upgraded to first class, we cannot abide a liability system that holds women back in the dark ages of medicine.

Mr. President, two principal points in Dr. Healy's essay, I think, deserve special emphasis.

The first has almost been ignored entirely since the opening salvos in this debate. That is, the tremendous cost of the present system, a tremendous cost which does not go to victims under any set of circumstances.

Dr. Healy speaks of medical malpractice as producing 40 percent of all the insurance premiums that go into medical malpractice insurance to victims and 60 percent to lawyers and to administrative costs, the rest to the costs of the system itself.

Mr. President, that figure is not limited to medical malpractice. It is endemic across the board in product liability litigation. I am astounded that we have not been met with an outrageous attack on this system by the very Members of this body who, instead, are arguing for its preservation without change.

They who speak of victimization, they who speak of appropriate compensation seem overwhelmingly content with a system where 60 percent of the money that goes into it ends up in the pockets of people who are not victims but who are lawyers or expert witnesses or insurance investigators or the like.

In almost any other aspect of our lives, we would be outraged by a 60-percent administrative cost. If anything, Mr. President, that 60 to 40 percent split underestimates the cost of the system. That is only what is reflected in medical malpractice premiums. It does not reflect at all the unnecessary defensive medicine that is practiced in order to try to prevent such claims from coming up in the first place.

If there were no other reason for change, to make more effective compensating the actual victims of negligence, either in product liability or medical malpractice, we should be demanding reform instead of fighting that reform.

At the same time, Mr. President, if this split in favor of overwhelming administrative costs is shocking, it seems to me especially shocking is the other principal point made by Dr. Healy and by others, the tremendously adverse impact of the present system on research, on the development of new products, whether National Institutes of Health related, machine tools—a wide range of products and the marketing of those products.

First, of course, is that the price of every such product includes an insurance premium, a product liability insurance premium. More significant than that—more significant than that—are the choices made by companies faced with this lottery system.

My distinguished friend and colleague from New Mexico last Friday read a statement by retired U.S. Supreme Court Justice Lewis Powell, which I can only paraphrase here, saying that the most irrational form of business regulation is the product liability system.

We have in this Government a large number of regulatory bodies, many of which are devoted to the safety and effectiveness of the kinds of articles, the kinds of products that we use in our lives every day. Those agencies, of course, are not infallible. By comparison, a jury system dealing with a specific instance only, in every case is a pure lottery. The argument that somehow or another this system, which on identical facts can come up with a verdict for a defendant after a huge investment in the costs, or a multimillion-dollar punitive damage claim for actions deemed by the jury to have been deliberate or close to deliberate, is exactly that; it is a lottery.

What is the rational response of a small business or, for that matter, a very large business in the field of producing new and improved items, especially related to our health? Well, the response is, in many cases, the flame is not worth the candle. Why should we as a company subject ourselves to tens of millions of dollars in attorney's fees, even in cases in which we are successful, and the possibility, however remote, of multi-million dollar judgments and terrible publicity in punitive damages in connection with a product which sells for a relatively low profit margin? Companies will, under those circumstances, not so much weigh the question of the safety of a particular device or medicine or product, they will weigh their potentials for successful business against the potential of all of these large attorney's fees and potential punitive damage awards.

And what happens? What happens is many companies simply get out of the business; 90 percent of all of the companies manufacturing football helmets, for example, have abandoned the business during the course of the last 20 years. Major national laboratories and developers have abandoned the search for drugs that will have a positive impact on the AIDS epidemic because their calculation was that the legal costs of introducing such drugs, even with the approval of the Food and Drug Administration, vastly exceeded any profit that they can make on them. Other companies have gotten out of the business, as Dr. Healy says in one particular case here, ''. . . have gotten out of the business of producing traditional immunizations and the like because of the potential cost of either verdicts or even the cost of successfully defending lawsuits.''

We have discussed on this floor the dramatic impact of product liability litigation against companies manufacturing piston driven aircraft, a 95-percent reduction in the production of that kind of aircraft in the United States over a 20-year period all because of product liability litigation. Not successful lawsuits, Mr. President; in the overwhelming majority of these cases, the lawsuits were unsuccessful. But the costs of a successful defense are often more than the costs of a judgment. So that industry was practically destroyed until a modest change was made by this Congress last year and we have, in that one industry, the beginning of a recovery.

Mr. CRAIG assumed the chair.

Mr. GORTON. The goal of product liability legislation is the recovery and development of those industries which make our lives better, which provide new and more effective treatment for medical conditions to which all of us are subject, more and better products for our enjoyment, for our transportation, for every other aspect of our lives. And when we can do that without

denying a single claimant the right to go into court and the right to recover all of the actual damages that a jury awards to that plaintiff—all of the actual damages—and when we can do that at so low a cost to anyone except those who benefit from the litigation itself, it would not seem to me that this debate should have lasted as long as it did or that its result should still be so highly unpredictable.

So, I congratulate Dr. Healy on her particular insight into this question, and say that insight can be expanded across the entire scope of the legislation with which we are dealing here and urgently speaks for its passage.

I did want to remark briefly on two questions which were propounded by the Senator from Minnesota to the supporters of this legislation an hour or so ago. The Senator from Minnesota asks, and I hope I paraphrase him accurately, ''What projections are there for how many people will be denied how much money as a result of the cap on punitive damages included in this legislation?'' The second question was, ''What is the extent of adverse effects of the bill on the deterrent effect of uncapped punitive damages?''

In a sense, each of those questions is the same. Ironically, the answer to the first question, how many people will be denied how much money by some kind of limitations on punitive damages, has probably been answered most eloquently by the opponents to the bill. Opponents to the bill have been at great pains to say that there is no litigation explosion with respect to product liability litigation. That is an interesting argument, since the contrary argument has never been made on the floor of this Senate during the course of the last week. And that only a relative handful of punitive damages judgments had been entered in the last 10 to 12 to 20 years in product liability litigation.

Of course, not all of those awards would be affected by this cap. A number of them are less than the cap is in the bill in its present form. So the answer is, ''Not very many people directly through the litigation system will be denied very much money by the passage of this bill in this form.''

But what is not asked in the question is, no one, not a single individual, will be denied $1 of the actual damages that they suffer and have proved to a judge and jury by this litigation because punitive damages, by its very definition, is an award above and beyond the damages suffered by a claimant in a particular case.

The importance of this legislation in connection with punitive damages is not so much in connection with actual awards as it is with the effect of the threat of potential awards against sound business judgment about the marketing, particularly of new and improved articles, items, and products; and the fear of losing such a lottery on the settlement of lawsuits for more money than can justly be found due to a given claimant in order to prevent that lottery from going against a particular defendant.

While we can probably come up with an accurate and relatively low count of the number of major punitive damage judgments in product liability cases, it is impossible to come up with the number of product liability cases in which punitive damages have been alleged for $1 million, for $10 million, for $100 million. It costs very little for the word processor to add another zero to the prayer in a complaint for damages. And in every case, that complaint must be taken seriously by a potential defendant. There is no way to predict the outcome and therefore many settlements are made for claims which are not justified, in significant amounts of money, and it is that uncertainty which has so constricted the desire of many businesses to make valid business judgments, not only from the point of view of the businesses themselves but to the great gain of the people who would otherwise have used those new products.

Again, we can simply go back to the one area in which we know what the impact has been and will be, piston driven aircraft, 95 percent destroyed by the system, significantly restored already last year since the modest reform in the system has been made.

That, too, answers the second question propounded by the Senator from Minnesota. What is the extent of the adverse effects of the bill on the deterrent effect of uncapped punitive damages? Again to paraphrase Justice Powell, this is the most irrational system of business regulation that can be imagined. It lacks any general principle whatsoever. It lacks any certainty whatsoever. It is utterly arbitrary.

Mr. President, I am sure that the Senator from Minnesota would not for 1 minute countenance our changing the Criminal Code to one in which no matter what the crime the jury could impose whatever sentence it thought appropriate—capital punishment for an assault, life imprisonment for running a stop sign. Yet, that is by analogy exactly what we do with a punitive damages system, unlimited in every case except by the judgment of the jury itself.

Moreover, the criminal justice system at least requires proof beyond a reasonable doubt, something not required as far as I know by any State having punitive damages. The deterrent effect: Well, Mr. President, the State I represent in this body does not now and never has allowed punitive damages in the bulk of civil litigation, nor have four or five other States. And there is no evidence that there is any greater carelessness or willfulness on the part of business enterprises in that State in dealing with consumers in our State because of the entire absence of punitive damages.

So my answer to the question, ''What is the extent of the adverse effects of the bill on the deterrent effect of uncapped punitive damages?'' is: None. Not a conditional answer whatsoever; the answer is none. We have far better and far more just ways of dealing with rogue business enterprises than to deal with any such businesses in this fashion and in a fashion which deter the State's legitimate businesses and those who would wish to use such, to benefit from what those businesses will produce in the way of products and treatments and the like.

So, Mr. President, I think we are perhaps winding up our day on this subject. I repeat once again, for the benefit of all of my colleagues, that today we must have all of the amendments introduced to the McConnell amendment, the amendment seeking to limit malpractice to a product liability bill. There will be a brief time of debate, approximately 1½ hours and a half tomorrow in the morning and then a series of votes on all of those amendments, after which we will go on to other amendments dealing with the general bill itself.

Seeing no Member who wishes to offer an amendment or a comment on the floor at the present time, Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KYL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KYL. Mr. President, I have been trying to watch the proceedings on the floor all day. I was here twice before talking about amendments that are pending before the body on the issue of malpractice reform. I have been disappointed, frankly, that there has not been more debate joined on two very, very critical questions, except for a brief colloquy which the Senator from Minnesota and I had earlier today, I have heard virtually no refutation of the points that I have set forth regarding the two amendments. I wanted to spend 5 minutes this evening summarizing my views prior to the time that we will have votes on these two issues tomorrow.

Mr. President, you know that we have before us the product liability legislation by which we are going to try to reform this Nation's product liability laws. Pending is also an amendment—the McConnell-Lieberman-Kassebaum amendment—which will add the medical malpractice area to that reform. There are a couple of specific amendments pending to that which we hope will help to further reform our tort law relating to medical malpractice; specifically, an amendment that would limit attorney's fees and, secondly, one that would put a cap on noneconomic damages.

The point of these two amendments is to try to return more of the recoveries of these cases to the victims, to the plaintiffs or claimants in the cases. In the past, the claimants received—in fact, today the claimants receive on the order of 40 to 50 percent of the recoveries, and the attorneys receive most of the rest.

In fact, several studies demonstrate that at least half of the recovery in these kinds of cases go to the attorneys. Let me cite two or three of those studies, Mr. President. There is a Rand study which demonstrates that about 50 percent of the money goes to lawyers, and less than 50 percent goes to the claimants. Some of it goes to administration. There are other studies that show somewhere in the neighborhood of between 40 and 50 percent. The bottom line is that the claimants are not getting the recovery; the attorneys are.

As a result, what we have sought to do is to limit the recovery of the attorneys in the noneconomic damage area to 25 percent of the first $250,000. That is over $60,000. In addition to that, the attorney, under the McConnell amendment, would be getting either 33⅓ percent of the first $150,000, or 25 percent of everything thereafter, on all economic damages.

So let us take a very large recovery for the sake of argument. Let us take a million-dollar recovery. The attorneys could easily get between a quarter of a million or more in their contingent fee from that. Then, of course, if punitive damages are further sought, an attorney, under my amendment, could go to the court and ask for a reasonable fee. Twenty-five percent would be presumed to be reasonable, and the court would have to determine it based on reasonableness and the ethics standards to apply to attorney fees. We are not limiting attorneys from recovering their fees. We are saying in a great big recovery, where it is a multimillion-dollar recovery, the bulk is not going to go to the attorneys. About 75 percent would go to the claimants.

The adjunct to that is a limitation on the noneconomic damages themselves. By giving the claimants more of the money that they get and giving less of it to the attorneys, we can afford to put a cap on the noneconomic damages. That is what the second amendment I have introduced would do. The House-passed cap is $250,000. But a lot of our colleagues in the Senate said $250,000 was just too stringent in that exceptional case. They are rare, but in those exceptional cases where you would want to give an award of more than a quarter of a million dollars, you can provide an award of up to $500,000 under my amendment. It could not be discounted at the present value. So that is a lump sum of money. Invested over a period of time, it could make millions of dollars. That is on top of the economic damages, which would be collected to totally recompense the plaintiff for all out-of-pocket expenses as well as lost earning power and any other economic damages.

So you do not limit the totality of the award so much as you provide that the claimant gets the award by putting a limit of $500,000 on the noneconomic damages. By having a limit on the attorney's fees, the claimants get essentially the same thing. But the attorney's fees are reduced to a more reasonable level. So these two amendments fit hand-in-glove. We are going to be voting on them tomorrow.

I urge my colleagues to support the limit on attorney's fees and the limit on noneconomic damages. Some of my colleagues says the limit on attorney's fees is not strong enough. It does not really whack the lawyers. That is not my objective. My objective is to make sure there is a fairness and a balance here and that some reason is restored to the system. With respect to the noneconomic damages limit, there is a question about really whether that will do any good. I just want to cite to my colleagues the Office of Technology Assessment report of 1993 which said:

> Limits on noneconomic damages is the single most effective reform in containing medical liability premiums.

We all suffer by virtue of medical expenses going out of sight, of physicians having to close down their practices or decline to serve certain kinds of patients because of the escalating costs of medical malpractice premiums. This is one of the cost-drivers in this whole health care reform debate. We have to get that under control. When a group like the OTA notes the fact that this is one of the most significant reforms we can pass, it seems to me important to do so.

So again, I urge my colleagues, when we vote on these two amendments tomorrow to, of course, support the McConnell-Kassebaum-Lieberman amendment and to support my amendment on attorney's fees and on limiting noneconomic damages. I think if we do all three of those things, we will have strengthened the bill and will be better able to go to conference and come out with a really strong bill that, as a result, we can tell the American people we have done something in this area of medical malpractice and tort liability reform.

Thank you, Mr. President.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, for 2 days during the consideration of the product liability bill the Senate has been debating fundamental change to the system under which victims of medical negligence are compensated for their injuries. I regret that the subject of malpractice reform is before the Senate as a rider to product liability legislation. We should not begin to tinker with the malpractice liability system except as a part of a more comprehensive effort to reform the Nation's health care system.

As we have pointed out at other times in the debate, tomorrow we will have an opportunity to give consideration to a proposal that deals with malpractice insurance that represents the best judgment of the Human Resources Committee of a year ago and which will reflect a bipartisan effort to come to grips with that particular issue. We are not in that situation at the present time.

That particular proposal was also accompanied by a variety of proposals to try to avoid medical malpractice, to try to enhance the quality of health care so that we were not going to have the incidence of malpractice. But we do not have included in this legislation the provisions to try to enhance quality health care, nor do we have this measure as a part of a comprehensive health care proposal.

The health care crisis in this country continues to be extremely serious. Last year, the number of Americans without health insurance increased by more than 1 million people, 800,000 of whom were children. Costs are spiraling out of control. Our health care system needs urgent repair, and malpractice reform is at most one small part of such reform.

Proponents of malpractice reform speak of a crisis, but they are ignoring the real health care crisis. By the year 2000, only half of working Americans and their families will be protected by health insurance through an employer. As recently as 1987, two-thirds had this protection. Forty million Americans have no coverage today and, by the year 2000, 50 million will have no coverage. If current efforts to cut Medicaid and Medicare are successful, the number could be much higher. Eighty-five percent of those who have no insurance are members of working families. They face a health care crisis every day. But even those who currently have coverage cannot be complacent because, if they lose their job or change jobs or become seriously ill, their health insurance is in jeopardy.

This is the point, Mr. President. Here we are taking one small phase of the whole health care issue that effectively is going to protect negligent doctors and substandard hospitals as being the principal measure to be considered as health care reform when we have these other kinds of issues and challenges which we are facing as a country, and we are not addressing them. We are not addressing them. We are not addressing the serious, continued decline of the coverage of working families. Eighty-five percent of those not covered are from working families.

Where are their interests covered in this legislation? They are not. And

what we have seen is the fastest growing group of individuals who are not being covered end up being children in our society. Working families and children, their interests are not being attended to with this particular measure that is before us because it is just dealing with the issues affecting negligent doctors and substandard treatment.

Senior citizens have no coverage for prescription drugs. This is another problem. Coverage for long-term care is grossly inadequate—another health care problem. Last year, the average senior citizen had to spend one-quarter of his or her income on health care, and that does not count those who are in nursing homes and hospitals.

Health care costs are out of control. We have the problem with access, the coverage of people, and we have the issue of health care costs. Those are essential elements. We have the other additional issue of quality health care that has to be attended to and other measures in the health care debate. But we have the access issue and the cost issue. And the costs are out of control. The Nation spent $1 trillion on health care last year and that number will double in 10 years. Health care costs are devastating to the Federal budget and to the family budget. And this is the health care crisis we should be talking about and these are the people who need the protection.

Getting the handle on health care costs in Medicare and Medicaid ought to be a part of health care reform. Many of us are strongly committed to that particular challenge. That will make a difference in terms of the quality of health care for senior citizens. And for the rest of Americans, it can make a difference in terms of the escalation of health care costs and it can make an important difference for the families in this country.

But are those the issues that we are debating here on health care this evening? Absolutely not. We are dealing with a very narrow issue of profit for the medical insurance industry, $1.4 billion in 1991 profits. And who pays for that? It is the American consumer. And that is what is happening on the floor of the Senate.

Instead, the proposals before the Senate offer protection to substandard doctors and substandard hospitals. Limits on malpractice liability will be a windfall for them—and also for an insurance industry already reaping record profits. The crude limits in this amendment are an insult to hundreds of thousands of patients injured or killed every year as a consequence of medical negligence.

Medical malpractice is the third leading cause of preventable death in the United States. According to researchers at the Harvard School of Public Health, 80,000 Americans die in hospitals each year from the negligence of physicians or other health providers, and an additional 1.3 million are injured. As many as a quarter of all patient deaths could have been prevented but for negligent medical care.

It is ironic that one of the first pieces of health legislation considered by the Senate this year would actually hurt patients by protecting negligent doctors and their insurance companies. In fact, the current malpractice compensation system already offers too much protection to doctors and insurance companies.

Fewer than 2 percent of malpractice victims ever file suit. The rate of medical malpractice claims has declined steadily since 1985. Patients won fewer than one-third of the malpractice verdicts in a 1994 study. The size of malpractice awards has dropped significantly in the last year alone, according to the New York Times.

The legal system pays only 1 malpractice claim for every 15 torts inflicted in hospitals, according to Business Week. According to Business Week, the legal system pays 1 malpractice claim for every 15 torts inflicted in hospitals.

That is what is happening. It is not just the studies at the Harvard School of Public Health. This is Business Week that is demonstrating the inadequacy of the system—the fact that there are hundreds of thousands of Americans who are not compensated, that the total number of claims are going down, that the premiums are going down, and that the insurance industry's profits are soaring up through the roof. That is what we are dealing with here on this particular issue.

And Business Week points out, rather than a surplus, the article concludes, there is a ''litigation deficit because so many injured people wind up undercompensated.''

That is the true problem that we are facing. Are our fellow citizens, who are subject to malpractice, unable to have any kind of compensation, unable to get any kind of help and assistance? That is what we are talking about.

Those are the issues that we addressed in a bipartisan way in the Labor and Human Resources Committee last year to try to work through alternative dispute resolutions and other kinds of measures in order to make sure that people are going to receive at least some benefit.

Part of the reason for this litigation deficit is that the legal system is inaccessible to so many citizens. That problem will be exacerbated by the proposals now before the Senate. The deficit is also attributable to the malpractice reforms already adopted in many States under pressure from the powerful medical insurance lobbies.

I do not know how many of our fellow colleagues turned on the television over the period of this weekend. I was back in Washington on Friday evening. Just after suppertime, I watch television to see the news for a couple of hours. I tried to watch it again on Saturday for a couple of hours. Eight times I saw—eight times—including twice on Sunday morning between 6 and 7 a.m. I do not know who the buyers of time are for those insurance companies and I do not know how much value they are getting for that particular purchase time, but you could not turn on the television programs all week long and not see those insurance industry spokesmen trying to replicate the television ads of last year that distorted the health care debate, talking about California, what is happening out in California.

Well, it is interesting. They were talking about how California had worked so well. Well, we find out, of course, that California has had a number of the kinds of changes in their tort legislation that is included in the McConnell amendment.

Here is a news release entitled ''AMA Propaganda False on Tort Law Restrictions, Report Shows.'' It says:

> A 1975 California law that limits the legal rights of victims of medical malpractice—the model for Federal tort law proposals before the U.S. Congress—has failed to deliver what its backers have promised, according to a study released today by a California nonprofit insurance watchdog organization.

What they pointed out is health care costs rose in California 343 percent between 1975 and 1993. The president-elect of the new AMA says that the No. 1 issue in the United States is access to health care—we can say that is true, along with increased costs—and then says the access to health care costs is malpractice reform, and urges us to go ahead with the McConnell amendment. And here we have an example of what happens with the McConnell amendment in one particular State, the State of California.

It shows that rather than having any impact in terms of slowing escalation of costs down, it has not. As a matter of fact, it has not done that in the other States.

I hear my friend from Indiana, Senator COATS, talk about the changes they have had in Indiana. The health care costs, in terms of health care in Indiana, have not gone down. They have not gone down in the other six States that have implemented many of the suggestions that are included in the McConnell amendment.

> Health care costs in California rose 343 percent between 1975 and 1993, faster than the inflation rate in California. Since 1985, the California Medical Consumer Price Index has grown nearly twice as fast as the inflation rate . . .
>
> Compensation paid to medical malpractice victims, as estimated by insurers, is a tiny fraction—about one-fifth of 1 percent.

One-fifth of 1 percent. That is what we are talking about. I mean, for anyone to look over, as I did the other day, the findings of this legislation, where they have the findings of the problem of access to health care, findings there is a problem of costs and therefore we have to enact this legislation, and you put that against what the real facts are and that is, if you just look at one State that has capped some damages

and has other changes in their malpractice law, they talk about the estimate by insurers on compensation of medical malpractice, one-fifth of 1 percent in 1993 of all health care costs in California, and the fraction has been dropping.

Medical malpractice liability insurance premiums paid by physicians and hospitals are a negligible components—about half of one percent in 1993—of California's total health care expenditures, and the percentage has been falling.

The idea that it is less than half of 1 percent and to think that is going to be able to leverage a health care system just reaches, I think, the impossible to imagine.

''Insurance companies have not reduced malpractice liability premiums commensurate with the drop in malpractice claims payments''—one might expect, if the insurance companies are giving less in terms of payments out in terms of injured individuals, one might think that the cost of that insurance might go down; that is not what is happening, not in California—''in recent years in both California and the nation. Insurance companies have reaped excessive profits from MICRA—in 1993, insurers paid out only 38 cents of every premium dollar.'' The rest of it goes in terms of administration, advertising and profits. That is what we are talking about this evening, because the McConnell amendment tracks very closely what has happened in California and in the five other States that have enacted measures which are similar to the McConnell amendment.

Despite the claims of the backers, such reforms have not lowered health care costs. The cost of medical care grew faster in California. And in Indiana, malpractice reforms have not caused health care costs to decrease. Compared to neighboring States, consumers derive no benefit from malpractice reform. In fact, they are harmed. If they fall victim to medical negligence, they are likely to be undercompensated for their injuries.

Malpractice reforms in States have been greeted enthusiastically by insurance executives. The General Accounting Office surveyed six States that enacted limits on recoveries in malpractice cases similar to what is before the Senate in terms of the McConnell amendment. And this is what the General Accounting Office—this is not the trial lawyers, this is the General Accounting Office. When I mentioned the other fact, it was not trial lawyers, it was Business Week talking about the fact of the few tort cases that are actually brought in our health care system.

This is what the General Accounting Office has said about the six States that have enacted limits in terms of awards in malpractice cases:

Insurance companies in those States were enjoying profits that averaged 122 percent above the national average. Nationwide, insurers reaped $1.4 billion in malpractice-related profits in 1991, but in those six States, the return was so great that the National Insurance Consumer Organization labeled it ''insurance profiteering.''

Insurance profiteering. Here we have the States themselves taking action, and I have a letter from some of the medical profession in the State of Michigan. This is true in many other States. Other States are taking action to try and deal with this problem that has changed dramatically since 1985 when we saw the rather dramatic increase in the number of malpractice cases, particularly with regards to obgyn's. We have seen those numbers go down dramatically in the period of the last 2 years. I included those in the RECORD at the end of last week.

Here we have the States themselves dealing with this issue. In the hearings that we had in our Health and Human Resources Committee, we did not have State attorneys general that were in there testifying saying, ''Look, we need a Federal preemption law.'' We did not hear from them on that issue, not from a Republican or Democrat. We did not have letters from Governors saying, ''Help us out, bail us out, get a preemptive law. We haven't got one.''

Maybe someone has a letter to that effect. We never saw it. It was never referred to, never commented on, never quoted. We do not have the Governors asking us for this action. We do not have the States attorneys general asking for this action. We do not have the State legislators saying, ''Please, bail us out, we can't handle this problem.'' We do not have that. We do not have that at all.

What we have is the medical insurance industry looking over what has happened in the States where they have been effective on wanting to preempt the States and to do it not in a single piece of legislation, not even taking the bill that was reported out of the committee, not even giving reference to that with the modest adjustments that were made to try and strengthen the quality provisions of this with the Jeffords amendment; to recognize that in the areas of punitive damages, when they have been utilized in the past, it has been against primarily women who have been the beneficiaries as a result of sexual exploitation at the hands of corrupt doctors.

We did not even have the chance to consider what was actually reported out of the committee. The medical malpractice industry insisted on the whole thing. They wanted the whole bill before it went to the committee and not what was acted on, either Republican amendments that were accepted or even Democrat amendments that were accepted, with support from different sides of the aisle. No, no, they wanted the whole thing.

This is in an area that is different from product liability. This is in an area that involves the most personal relationship between the doctor and the patient. What could be more local, what could be more within a State's jurisdiction more completely?

We can understand products produced in Massachusetts and shipped to California, those in Michigan are sent to Florida, we understand that there is a case to be made in terms of product liability. But we are talking about a doctor in a community dealing with a patient in that community and do we need a Federal solution for that?

The McConnell amendment says yes. The McConnell amendment has a one-size-fits-all. How many times have we heard that on the floor of the Senate? What we do not want is all knowledge in Washington. The solution to the problems in Boston are going to be different than in Pocatello, ID. How often do we hear that?

Here my friends say, ''Except when it affects the medical insurance industry on medical malpractice.'' Sure, the States have been acting. Sure, the States have been dealing with their particular problems that they are facing that are as diverse in some of the rural States or the mountain States as they are in some of the industrial States. Sure, they have been trying to deal with those particular issues. But here we say on the floor of the U.S. Senate, we are going to preempt those States, we are preempting, we know better on the issue of malpractice affecting a doctor and their patient in that particular community.

Mr. President, I find that it is an extraordinary extension of political philosophy that indicates a demand for this kind of standardization is so compelling. I think when you reach a situation where we are dealing with a total reform of a health care system that includes, for example, the 10 million Federal employees that are being covered by health insurance, expanding the Federal employees insurance to pick up people in all parts of the country that you say, ''OK, in those circumstances, we ought to permit the States to develop alternative dispute resolutions and permit the States to experiment with no-fault liability, pools with enterprise challenges and to permit experimentation, all of which we did last year.'' But, oh, no, we have a preemption of those States which may, according to the medical insurance industry, may be more sympathetic to the consumers than they are to substandard doctors, and that is where we are.

So we end up with a situation as we have heard now from the Michigan State Medical Society:

DEAR SENATOR KENNEDY: On behalf of our more than 12,000 physician members, the Michigan State Medical Society wishes to appraise you of our concern that the Michigan law of joint and several liability applicable to medical malpractice not be affected by Federal legislation. We have fought hard to retain joint and several liability in medical malpractice cases in Michigan, for the reason that its abolition would cause substantial increase in physicians' premiums and resultant health care costs. . .

Malpractice carriers in Michigan advise us the premiums would increase by 64 percent if the coverage was increased to $1 million,

which would be even more unaffordable but essential for the physicians' personal protection. . .

The dynamics of malpractice litigation . . . virtually require we retain the common law doctrine of joint and several liability in malpractice cases. . .

It is critical that Federal legislation not preempt State joint and several liability laws.

Twelve thousand doctors in Michigan say they do not need the preemption that is in the McConnell amendment. The list goes on.

I daresay, as more and more of them begin to understand what is really going on here, and the fact that we have rushed to judgment on this issue—2 days after we take the action in the committee, we have the amendment right here on the floor. Generally, you have a reporting out of 10 days, you have a report that points out the reasons and the justifications for those provisions. You have the opinions of those that might differ that are published and circulated by the various groups that are interested in this, and had a chance to review that. Oh, no, not on this measure. We have to put it right on the product liability without a report, without even printing—I do not know whether today it is available, but last week it was not—even the printed changes in the legislation, based upon the amendments that we had included.

You are going to find out, my friends and colleagues, how many other doctors are going to get a chance to finally have a chance to sit down and look this over and say, woe, how did we get into this? The president of the Michigan State Medical Society, Jack Barry, sent a carbon copy of a letter he sent out. I wish he sent it to colleagues on our committee. He sent it to his colleagues in the medical community.

I ask unanimous consent that the letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

MICHIGAN STATE MEDICAL SOCIETY,
East Lansing, MI, April 20, 1995.

Senator EDWARD M. KENNEDY,
Ranking Member, Senate Labor and Human Resource Committee, Washington, DC.

DEAR SENATOR KENNEDY: On behalf of our more than 12,000 physician members, the Michigan State Medical Society wishes to apprise you of our concern that the Michigan law of joint and several liability applicable to medical malpractice cases not be affected by federal legislation. We have fought hard to retain joint and several liability in medical malpractice cases in Michigan, for the reason that its abolition would cause substantial increases in physicians' premiums and resultant health care costs.

As you undoubtedly know, medical malpractice litigation in Michigan has been out of control. Premium costs for malpractice coverage in Michigan virtually exceed all other states. Malpractice insurance in Michigan is typically $200,000 per occurrence, with an annual aggregate of $600,000. The annual premium cost to obstetricians and surgeons in southeastern Michigan often exceeds $80,000. Even with this substantial cost, the coverage is still insufficient to provide comfort to physicians. Malpractice carriers in Michigan advise us that premiums would increase by 64 percent if the coverage was increased to $1 million, which would be even more unaffordable but essential for the physicians' personal protection if joint and several liability was abolished.

As a result of this unique problem in Michigan, the Michigan legislature adopted malpractice reform legislation which took effect on April 1, 1994. This legislation has not yet had any effect upon premiums for the reason that it essentially applies prospectively and is being constitutionally challenged in the state appellate courts. We are helpful that this legislation will cause malpractice costs to fall into line with other states when this legislation becomes fully applicable to malpractice cases. Until then, we will continue to have the unique and costly problem in Michigan.

The dynamics of malpractice litigation in our state virtually require that we retain the common law doctrine of joint and several liability in malpractice cases. The potential for joint liability causes hospitals and other corporate defendants to more readily settle cases where the greater liability might potentially be imposed upon individual physicians. This provides at least some protection to the physician in engaging in the higher risk practices and also has a beneficial effect upon the legal system and the public generally in that cases are more likely to settle. Michigan law has, therefore, retained joint and several liability.

We urge you to protect the current status of joint and several liability in Michigan. It is critical that federal legislation not preempt state joint and several liability laws. Any federal legislation enacting malpractice reform should have a provision clearly making the federal legislation inapplicable to the extent that state statutes retain joint and several liability in medical malpractice cases.

The Michigan State Medical Society fully supports the federal legislation in malpractice reform, including a $250,000 limitation on noneconomic damages. We urge you to support this federal legislation, but request that you protect the interests of physicians and their patients in Michigan by assuring that any federal legislation will not preempt joint and several liability in medical malpractice cases in this state.

Thank you for your help. If you have any questions, please feel free to contact Kevin A. Kelly, Managing Director, Michigan State Medical Society at (517) 336–5742.

Sincerely,

JACK L. BARRY, MD,
President.

Mr. KENNEDY. If enacted, the proposals before the Senate today may well fatten the profit margin of malpractice insurers nationwide. But malpractice reform will not address the fundamental problems facing our health care system. It has not in California, or Indiana, or elsewhere. In any event, the cost of medical malpractice premiums amounts to only six-tenths of 1 percent of the Nation's health care costs.

Nor will legal reforms make a dent in the prevalence of malpractice itself. Instead, we need more effective means to discipline the few bad apples in the medical profession who cause upwards of 45 percent of all of the unnecessary injuries. Today, a negligent auto mechanic or a negligent funeral director is more likely to be disciplined by a State licensing board than a physician.

That is really saying something, Mr. President. Are we here attempting to discipline? No, we are not even beginning to go down that road. We are not even in the legislation that is being provided giving the full information. That is a matter of public record, included in the data bank to consumers. It can be collected. I understand my friend from Minnesota, Senator WELLSTONE, has addressed this issue. There is already the assemblage of that kind of information, but it is not done in a comprehensive way as I think it should be. Hospitals can find out certain information with regard to disciplinary conduct with regard to professions. HMO's can find that out but the consumers cannot.

There was no real effort or attempt—there was a good faith expression that we ought to get after this issue and we will revisit it later. But we are still moving ahead with the legislation.

First, Mr. President, here are the four major flaws of the McConnell amendment:

First, it sets an impossibly high standard for awarding punitive damages and then imposes a cap on such damages, even in cases involving sexual abuse of a patient and other outrageous conduct. Sixty-eight percent of all punitive damage awards in malpractice cases are awarded to women, so the impact of this provision is discriminatory.

Now we know that those punitive cases are only a small number of cases. We did not include, for example, in the markup, other kinds of cases, for example, when doctors go in and practice a medical procedure when they are on illegal drugs. We did not include that in the legislation, in the amendment. Or when hospitals knowingly and willfully destroy records with regard to the treatment of patients. We did not even include that in it. We did not even include the punitive damages situations where doctors lost their licenses in a State and fraudulently practice in another State. I would think that any Member of this body who was concerned about what is happening to any member of their family wrote would think that in those circumstances, and in some others, punitive damages would be justified. We did not. We included one reference in our Senate markup to permit punitive damages if the standard was to be met in terms of the intent standards, which is extremely high, and in the Dodd amendment, which gave the jury the power to establish whether punitive damages should be awarded and the judge, with guidelines, to set the amount. But that has been effectively set aside.

Second, the amount severely limits the longstanding legal doctrine of joint and several liability, leaving the patients vulnerable to inadequate compensation. For at least 100 years, it has to be recognized as unacceptable to force an innocent patient to bear the cost of other people's negligence if one or more of the wrongdoers are available to provide compensation. That is a sensible rule to protect patients, and

we should not undermine it for the benefit of guilty malpractice defendants.

I point out, Mr. President, that we are talking about an individual who has been wrongfully treated. I think we can understand the circumstances of what might appear to be unfair and unjust, payments by those who are brought into the compensation awards through joint and several. There are many here that are enormously sympathetic to anyone that would be so included.

The fact of the matter is, Mr. President, we are talking about circumstances where there has been malpractice and where, if they do not collect it, they are not given any kind of adequate remedy for the malpractice. It is interesting. Effectively, this legislation is immunizing the medical insurance companies, and as we do that, make no mistake about who pays for all of the other care for those individuals. It ends up being the taxpayers—to the tune of about $60 billion a year.

So here we go in and set up a program that has windfall profits when this has been adopted in the six States, and we are going to do it nationwide and you are going to see—even according to Business Week and the business insurance publication—the benefits that are going to the insurance industry. Who is left holding the bag? On the one hand, it is the victims, and on the other hand it is the taxpayers. They are going to be the ones that are going to be left paying for the care of this individual rather than the wrongdoer. That is wrong and unfair.

Third, the amendment denies consumers access to the information about the fitness of their doctors, even when those doctors have repeatedly committed malpractice or have been repeatedly disciplined. The Wellstone amendment addresses this flaw and I hope that will be accepted.

Finally, the McConnell amendment unjustifiably preempts a wide array of the State malpractice laws.

The preemption language in the proposal before us is not balanced. It strikes down State laws that are of benefit to consumers. I think it is not appropriate. If preemption of State tort laws were appropriate, and I think it is not, it should at least be accomplished in a fair and even-handed manner. The one-way preemption in the amendment ensures the absence of the national standard that the proponents say they want.

For these reasons, I urge defeat of the McConnell amendment. But rejection of that proposal does not mean we should not take some action. There are a series of steps Congress should take to assist the States and improve the efficiency of the malpractice system in a way that will benefit both doctors and patients.

Last year, the Labor and Human Resources Committee favorably reported a health care reform bill which contained sensible malpractice reforms. We required alternative dispute resolution to provide for streamlined consideration of malpractice claims. We capped attorneys' fees to make sure that patients get fair compensation for their injuries, and that they get early resolutions for these claims, and to permit the States themselves to develop alternative dispute resolutions.

Let them develop those measures—they had to meet certain minimum standards—but permit the States to develop their own. That was one part of it.

We capped attorney's fees to make sure the parties get fair compensation for their injuries. We provided seed money to let the States experiment with innovative models such as enterprise liability, no-fault funds, and medical malpractice guidelines.

Medical malpractice guidelines—there is a case we could say if a person would establish the medical malpractice guidelines and doctors follow those, that ought to be a basic presumption against the malpractice and would permit what would be the basis of the evidence to be able to rebut that. I think there is a great deal that commends that concept. When we talked about it last year as part of the health care reform, it got labeled as ''cookbook medicine,'' that we will have medicine by the numbers.

So, there are legitimate public policy issues with regard to this issue that we ought to address seriously. That is not unimportant in terms of this whole debate. We ought to give serious consideration to that kind of an action, not just dismiss it completely as we have in this legislation. It is just not correct. It is a concept that can make an important difference in terms of quality health care and should not be dismissed out of hand, as it has been effectively in this legislation.

Some of last year's reforms have been included in the McConnell amendment, but in other ways that I have described, the amendment goes too far. I will offer a substitute amendment tomorrow that contains the reasonable reforms proposed by the Labor Committee last year.

I will also offer an amendment to strike the preemption provisions in the McConnell amendment. If the Federal Government is to involve itself in this area of the law, it should do this cautiously and with respect to State prerogatives.

For example, we received a strong request from the Michigan Medical Society urging that we not preempt that State's law, and joint and several liability. Federal malpractice reforms should only apply in those situations where no State statute is applicable. That was the concept which had bipartisan support. The legislation that was reported out of our committee was unanimous—unanimous—Republicans and Democrats alike on that issue. It will be that provision which I will offer with regard to preemption.

In urging ill-considered malpractice reforms, a hypocritical Congress is violating the Hippocratic oath, first, to do no harm. Some of the proposals before the Senate will cause great harm to large numbers of our fellow citizens if we reduce the ability of the legal system to deter negligent medical care. If we deny adequate compensation to severely injured patients, we violate basic principles of federalism. The Senate will have committed legislative malpractice.

Mr. President, I see the Senator from Maine, who has been extremely patient. As I understand, under the previous agreement—and I want to comply with the parliamentary situation that exists at the current time in order that my amendments be eligible—as I understand it, is it the desire of the Chair that we call them up and have them set aside? Is that the procedure which has been agreed on or is that the satisfactory procedure?

The PRESIDING OFFICER (Mr. FRIST). The Senators have been following that procedure by unanimous consent.

AMENDMENT NO. 607 TO AMENDMENT NO. 603

Mr. KENNEDY. Mr. President, I will follow that same procedure. I ask unanimous consent that the pending amendment be set aside, and I will call up amendment No. 607 and ask it be considered.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Massachusetts [Mr. KENNEDY] proposes an amendment numbered 607 to amendment No. 603.

Mr. KENNEDY. Mr. President, I ask unanimous consent further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

In lieu of the matter proposed to be inserted, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Medical Liability Reform Act of 1995''.

TITLE I—LIABILITY REFORM

SEC. 101. FEDERAL TORT REFORM.

(a) APPLICABILITY.—

(1) IN GENERAL.—Except as provided in section 102, this title shall apply with respect to any medical malpractice liability action brought in any State or Federal court, except that this title shall not apply to a claim or action for damages arising from a vaccine-related injury or death to the extent that title XXI of the Public Health Service Act applies to the claim or action.

(2) EFFECT ON SOVEREIGN IMMUNITY AND CHOICE OF LAW OR VENUE.—Nothing in this title shall be construed to—

(A) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(B) waive or affect any defense of sovereign immunity asserted by the United States;

(C) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976;

(D) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation; or

(E) affect the right of any court to transfer venue or to apply the law of a foreign nation

or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum.

(3) FEDERAL COURT JURISDICTION NOT ESTABLISHED ON FEDERAL QUESTION GROUNDS.—Nothing in this title shall be construed to establish any jurisdiction in the district courts of the United States over medical malpractice liability actions on the basis of section 1331 or 1337 of title 28, United States Code.

(b) DEFINITIONS.—In this Act, the following definitions apply:

(1) ALTERNATIVE DISPUTE RESOLUTION SYSTEM; ADR.—The term ''alternative dispute resolution system'' or ''ADR'' means a system that provides for the resolution of medical malpractice claims in a manner other than through medical malpractice liability actions.

(2) CLAIMANT.—The term ''claimant'' means any person who alleges a medical malpractice claim, and any person on whose behalf such a claim is alleged, including the decedent in the case of an action brought through or on behalf of an estate.

(3) HEALTH CARE PROFESSIONAL.—The term ''health care professional'' means any individual who provides health care services in a State and who is required by the laws or regulations of the State to be licensed or certified by the State to provide such services in the State.

(4) HEALTH CARE PROVIDER.—The term ''health care provider'' means any organization or institution that is engaged in the delivery of health care services in a State and that is required by the laws or regulations of the State to be licensed or certified by the State to engage in the delivery of such services in the State.

(5) INJURY.—The term ''injury'' means any illness, disease, or other harm that is the subject of a medical malpractice liability action or a medical malpractice claim.

(6) MEDICAL MALPRACTICE LIABILITY ACTION.—The term ''medical malpractice liability action'' means a cause of action brought in a State or Federal court against a health care provider or health care professional by which the plaintiff alleges a medical malpractice claim.

(7) MEDICAL MALPRACTICE CLAIM.—The term ''medical malpractice claim'' means a claim brought against a health care provider or health care professional in which a claimant alleges that injury was caused by the provision of (or the failure to provide) health care services, except that such term does not include—

(A) any claim based on an allegation of an intentional tort;

(B) any claim based on an allegation that a product is defective that is brought against any individual or entity that is not a health care professional or health care provider; or

(C) any claim brought pursuant to any remedies or enforcements provision of law.

SEC. 102. STATE-BASED ALTERNATIVE DISPUTE RESOLUTION MECHANISMS.

(a) APPLICATION TO MALPRACTICE CLAIMS UNDER PLANS.—Prior to or immediately following the commencement of any medical malpractice action, the parties shall participate in the alternative dispute resolution system administered by the State under subsection (b). Such participation shall be in lieu of any other provision of Federal or State law or any contractual agreement made by or on behalf of the parties prior to the commencement of the medical malpractice action.

(b) ADOPTION OF MECHANISM BY STATE.—Each State shall—

(1) maintain or adopt at least one of the alternative dispute resolution methods satisfying the requirements specified under subsection (c) and (d) for the resolution of medical malpractice claims arising from the provision of (or failure to provide) health care services to individuals enrolled in a health plan; and

(2) clearly disclose to enrollees (and potential enrollees) the availability and procedures for consumer grievances, including a description of the alternative dispute resolution method or methods adopted under this subsection.

(c) SPECIFICATION OF PERMISSIBLE ALTERNATIVE DISPUTE RESOLUTION METHODS.—

(1) IN GENERAL.—The Board shall, by regulation, develop alternative dispute resolution methods for the use by States in resolving medical malpractice claims under subsection (a). Such methods shall include at least the following:

(A) ARBITRATION.—The use of arbitration, a nonjury adversarial dispute resolution process which may, subject to subsection (d), result in a final decision as to facts, law, liability or damages.

(B) CLAIMANT-REQUESTED BINDING ARBITRATION.—For claims involving a sum of money that falls below a threshold amount set by the Board, the use of arbitration not subject to subsection (d). Such binding arbitration shall be at the sole discretion of the claimant.

(C) MEDIATION.—The use of mediation, a settlement process coordinated by a neutral third party without the ultimate rendering of a formal opinion as to factual or legal findings.

(D) EARLY NEUTRAL EVALUATION.—The use of early neutral evaluation, in which the parties make a presentation to a neutral attorney or other neutral evaluator for an assessment of the merits, to encourage settlement. If the parties do not settle as a result of assessment and proceed to trial, the neutral evaluator's opinion shall be kept confidential.

(E) CERTIFICATE OF MERIT.—The requirement that a medical malpractice plaintiff submit to the court before trial a written report by a qualified specialist that includes the specialist's determination that, after a review of the available medical record and other relevant material, there is a reasonable and meritorious cause for the filing of the action against the defendant.

(2) STANDARDS FOR ESTABLISHING METHODS.—In developing alternative dispute resolution methods under paragraph (1), the Board shall assure that the methods promote the resolution of medical malpractice claims in a manner that—

(A) is affordable for the parties involved;

(B) provides for timely resolution of claims;

(C) provides for the consistent and fair resolution of claims; and

(D) provides for reasonably convenient access to dispute resolution for individuals enrolled in plans.

(3) WAIVER AUTHORITY.—Upon application of a State, the Board may grant the State the authority to fulfill the requirement of subsection (b) by adopting a mechanism other than a mechanism established by the Board pursuant to this subsection, except that such mechanism must meet the standards set forth in paragraph (2).

(d) FURTHER REDRESS.—Except with respect to the claimant-requested binding arbitration method set forth in subsection (c)(1)(B), and notwithstanding any other provision of a law or contractual agreement, a plan enrollee dissatisfied with the determination reached as a result of an alternative dispute resolution method applied under this section may, after the final resolution of the enrollee's claim under the method, bring a cause of action to seek damages or other redress with respect to the claim to the extent otherwise permitted under State law. The results of any alternative dispute resolution procedure are inadmissible at any subsequent trial, as are all statements, offers, and other communications made during such procedures, unless otherwise admissible under State law.

SEC. 103. LIMITATION ON AMOUNT OF ATTORNEY'S CONTINGENCY FEES.

(a) IN GENERAL.—An attorney who represents, on a contingency fee basis, a plaintiff in a medical malpractice liability action may not charge, demand, receive, or collect for services rendered in connection with such action (including the resolution of the claim that is the subject of the action under any alternative dispute resolution system) in excess of—

(1) 33⅓ percent of the first $150,000 of the total amount recovered by judgment or settlement in such action; plus

(2) 25 percent of any amount recovered above the amount described in paragraph (1); unless otherwise determined under State law. Such amount shall be computed after deductions are made for all the expenses associated with the claim other than those attributable to the normal operating expenses of the attorney.

(b) CALCULATION OF PERIODIC PAYMENTS.—In the event that a judgment or settlement includes periodic or future payments of damages, the amount recovered for purposes of computing the limitation on the contingency fee under subsection (a) may, in the discretion of the court, be based on the cost of the annuity or trust established to make the payments. In any case in which an annuity or trust is not established to make such payments, such amount shall be based on the present value of the payments.

(c) CONTINGENCY FEE DEFINED.—As used in this section, the term ''contingency fee'' means any fee for professional legal services which is, in whole or in part, contingent upon the recovery of any amount of damages, whether through judgment or settlement.

SEC. 104. REDUCTION OF AWARDS FOR RECOVERY FROM COLLATERAL SOURCES.

(a) REDUCTION OF AWARD.—The total amount of damages recovered by a plaintiff in a medical malpractice liability action shall be reduced by an amount that equals—

(1) the amount of any payment which the plaintiff has received or to which the plaintiff is presently entitled on account of the same injury for which the damages are awarded, including payment under—

(A) Federal or State disability or sickness programs;

(B) Federal, State, or private health insurance programs;

(C) private disability insurance programs;

(D) employer wage continuation programs; and

(E) any other program, if the payment is intended to compensate the plaintiff for the same injury for which damages are awarded; less

(2) the amount of any premiums or any other payments that the plaintiff has paid to be eligible to receive the payment described in paragraph (1) and any portion of the award subject to a subrogation lien or claim.

(b) SUBROGATION.—The court may reduce a subrogation lien or claim described in subsection (a)(2) by an amount representing reasonable costs incurred in securing the award subject to the lien or claim.

(c) INAPPLICABILITY OF SECTION.—This section shall not apply to any case in which the court determines that the reduction of damages pursuant to subsection (a) would compound the effect of any State law limitation on damages so as to render the plaintiff less than fully compensated for his or her injuries.

SEC. 105. PERIODIC PAYMENT OF AWARDS.

(a) IN GENERAL.—A party to a medical malpractice liability action may petition the court to instruct the trier of fact to award any future damages on an appropriate periodic basis. If the court, in its discretion, so instructs the trier of fact, and damages are awarded on a periodic basis, the court may require the defendant to purchase an annuity or other security instrument (typically based on future damages discounted to present value) adequate to assure payments of future damages.

(b) FAILURE OR INABILITY TO PAY.—With respect to an award of damages described in subsection (a), if a defendant fails to make payments in a timely fashion, or if the defendant becomes or is at risk of becoming insolvent, upon such a showing the claimant may petition the court for an order requiring that remaining balance be discounted to present value and paid to the claimant in a lump-sum.

(c) MODIFICATION OF PAYMENT SCHEDULE.—The court shall retain authority to modify the payment schedule based on changed circumstances.

(d) FUTURE DAMAGES DEFINED.—As used in this section, the term ''future damages'' means any economic or noneconomic loss other than that incurred or accrued as of the time of judgment.

SEC. 106. CONSTRUCTION.

Nothing in this title shall be construed to preempt any State law that sets a maximum limit on total damages.

PART 2—OTHER PROVISIONS RELATING TO MEDICAL MALPRACTICE LIABILITY

SEC. 201. STATE MALPRACTICE REFORM DEMONSTRATION PROJECTS.

(a) ESTABLISHMENT.—The Secretary shall award grants to States for the establishment of malpractice reform demonstration projects in accordance with this section. Each such project shall be designed to assess the fairness and effectiveness of one or more of the following models:

(1) No-fault liability.

(2) Enterprise liability.

(3) Practice guidelines.

(b) DEFINITIONS.—For purposes of this section:

(1) MEDICAL ADVERSE EVENT.—The term ''medical adverse event'' means an injury that is the result of medical management as opposed to a disease process that creates disability lasting at least one month after discharge, or that prolongs a hospitalization for more than one month, and for which compensation is available under a no-fault medical liability system established under this section.

(2) NO-FAULT MEDICAL LIABILITY SYSTEM.—The terms ''no-fault medical liability system'' and ''system'' mean a system established by a State receiving a grant under this section which replaces the common law tort liability system for medical injuries with respect to certain qualified health care organizations and qualified insurers and which meets the requirements of this section.

(3) PROVIDER.—The term ''provider'' means physician, physician assistant, or other individual furnishing health care services in affiliation with a qualified health care organization.

(4) QUALIFIED HEALTH CARE ORGANIZATION.—The term ''qualified health care organization'' means a hospital, a hospital system, a managed care network, or other entity determined appropriate by the Secretary which elects in a State receiving a grant under this section to participate in a no-fault medical liability system and which meets the requirements of this section.

(5) QUALIFIED INSURER.—The term ''qualified insurer'' means a health care malpractice insurer, including a self-insured qualified health care organization, which elects in a State receiving a grant under this section to participate in a no-fault medical liability system and which meets the requirements of this section.

(6) ENTERPRISE LIABILITY.—The term ''enterprise liability'' means a system in which State law imposes malpractice liability on the health plan in which a physician participates in place of personal liability on the physician in order to achieve improved quality of care, reductions in defensive medical practices, and better risk management.

(7) PRACTICE GUIDELINES.—The term ''practice guidelines'' means guidelines established by the Agency for Health Care Policy and Research pursuant to the Public Health Service Act or this Act.

(c) APPLICATIONS BY STATES.—

(1) IN GENERAL.—Each State desiring to establish a malpractice reform demonstration project shall submit an application to the Secretary at such time and in such manner as the Secretary shall require.

(2) CONTENTS OF APPLICATION.—An application under paragraph (1) shall include—

(A) an identification of the State agency or agencies that will administer the demonstration project and be the grant recipient of funds for the State;

(B) a description of the manner in which funds granted to a State will be expended and a description of fiscal control, accounting, and audit procedures to ensure the proper dispersal of and accounting for funds received under this section; and

(C) such other information as the Secretary determines appropriate.

(3) CONSIDERATION OF APPLICATIONS.—In reviewing all applications received from States desiring to establish malpractice demonstration projects under paragraph (1), the Secretary shall consider—

(A) data regarding medical malpractice and malpractice litigation patterns in each State;

(B) the contributions that any demonstration project will make toward reducing malpractice and costs associated with health care injuries;

(C) diversity among the populations serviced by the systems;

(D) geographic distribution; and

(E) such other criteria as the Secretary determines appropriate.

(d) EVALUATION AND REPORTS.—

(1) BY THE STATES.—Each State receiving a grant under this section shall conduct ongoing evaluations of the effectiveness of any demonstration project established in such State and shall submit an annual report to the Secretary concerning the results of such evaluations at such times and in such manner as the Secretary shall require.

(2) BY THE SECRETARY.—The Secretary shall submit an annual report to Congress concerning the fairness and effectiveness of the demonstration projects conducted under this section. Such report shall analyze the reports received by the Secretary under paragraph (1).

(e) FUNDING.—

(1) IN GENERAL.—There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this section.

(2) LIMITATIONS ON EXPENDITURES.—

(A) ADMINISTRATIVE EXPENSES.—Not more than 10 percent of the amount of each grant awarded to a State under this section may be used for administrative expenses.

(B) WAIVER OF COST LIMITATIONS.—The limitation under subparagraph (A) may be waived as determined appropriate by the Secretary.

(f) ELIGIBILITY FOR NO-FAULT DEMONSTRATION.—A State is eligible to receive a no-fault liability demonstration grant if the application of the State under subsection (c) includes—

(1) an identification of each qualified health care organization selected by the State to participate in the system, including—

(A) the location of each organization;

(B) the number of patients generally served by each organization;

(C) the types of patients generally served by each organization;

(D) an analysis of any characteristics of each organization which makes such organization appropriate for participation in the system;

(E) whether the organization is self-insured for malpractice liability; and

(F) such other information as the Secretary determines appropriate;

(2) an identification of each qualified insurer selected by the State to participate in the system, including—

(A) a schedule of the malpractice insurance premiums generally charged by each insurer under the common law tort liability system; and

(B) such other information as the Secretary determines appropriate;

(3) a description of the procedure under which qualified health care organizations and insurers elect to participate in the system;

(4) a description of the system established by the State to assure compliance with the requirements of this section by each qualified health care organization and insurer; and

(5) a description of procedures for the preparation and submission to the State of an annual report by each qualified health care organization and qualified insurer participating in a system that shall include—

(A) a description of activities conducted under the system during the year; and

(B) the extent to which the system exceeded or failed to meet relevant performance standards including compensation for and deterrence of medical adverse events.

(g) ELIGIBILITY FOR ENTERPRISE LIABILITY DEMONSTRATION.—A State is eligible to receive an enterprise liability demonstration grant if the State—

(1) has entered into an agreement with a health plan (other than a fee-for-service plan) operating in the State under which the plan assumes legal liability with respect to any medical malpractice claim arising from the provision of (or failure to provide) services under the plan by any physician participating in the plan; and

(2) has provided that, under the law of the State, a physician participating in a plan that has entered into an agreement with the State under paragraph (1) may not be liable in damages or otherwise for such a claim and the plan may not require such physician to indemnify the plan for any such liability.

(h) ELIGIBILITY FOR PRACTICE GUIDELINES DEMONSTRATION.—A State is eligible to receive a practice guidelines demonstration grant if the law of the State provides that in the resolution of any medical malpractice action, compliance or non-compliance with an appropriate practice guideline shall be admissible at trial as a rebuttable presumption regarding medical negligence.

AMENDMENT NO. 615 TO AMENDMENT NO. 603

Mr. KENNEDY. Mr. President, I ask that the pending amendment be temporarily set aside, and I send an amendment to the desk and ask that it be considered.

The PRESIDING OFFICER. Without objection, it is so ordered.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Massachusetts [Mr. KENNEDY] proposes an amendment numbered 615 to amendment No. 603.

Mr. KENNEDY. Mr. President, I ask unanimous consent further reading be dispensed.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 8, line 20, insert after ''subsection'' the following: ''(b) and''.

Strike the material from page 9, line 4 through page 10, line 17, and insert in lieu thereof the following: ''The provisions of this subtitle shall not be construed to preempt any state statute but shall govern any question with respect to which there is no state statute.''

Mr. KENNEDY. Mr. President, I will include the two statements, one on the substitute which I referred to briefly now and in great detail last week, which I will expand on in my extended remarks, and the other deals with the preemption amendment.

As I understand from the leadership, we will consider those in a timely fashion in our procedure outlined by our leader tomorrow. I thank my colleagues. I yield the floor.

Mr. COHEN. Mr. President, I wish to address a few comments on the underlying bill, the Product Liability Fairness Act, which attempts to address some of the abuses that have occurred in the civil justice system. Unfortunately, the cure being offered is worse than the disease itself.

I am struck by the irony that many, particularly on this side of the aisle, have been calling for the deregulation of our economy, for returning power to the States, for empowering the people, and for trusting the judgment of our citizens. They invoke the 10th amendment as if remembering the Alamo—remember the 10th amendment.

Yet, at the very same time we are calling for this deregulation, this demassification—if I can use Toffler's phrase —of the power structure in Washington by returning power back to the States and local communities, we are now calling for the passage of another Federal piece of legislation.

At a time when we are searching for ways to streamline the civil justice system and to make litigation less cumbersome and costly, this bill is going to complicate the law and make litigation even more expensive.

At a time when we are trying to improve the lives of hard-working middle-class Americans, this bill is going to make it more difficult for these citizens to obtain compensation when they are injured, at work or at home, from defective products.

I am well aware that there have been cases involving abuse of our civil justice system. We have seen cases of outrageous jury awards and frivolous lawsuits, and they have undermined public confidence and interest in our legal institutions. Unfortunately, the bill before the Senate is not narrowly tailored to root out these abuses. Rather, it is an unprecedented and unwarranted Federal takeover of a core State responsibility.

Our system of federalism is based on the principle that the national government should address problems that confront the Nation as a whole, and State governments, which are closer to the people in both distance and temperament, should be responsible for local concerns.

Writing of ''Our Federalism'' almost 25 years ago, Justice Hugo Black stated that:

The concept . . . represents . . . a system in which there is sensitivity to the legitimate interest of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

No less of a proponent of a strong national government than Alexander Hamilton fully understood the genius of a system that divided powers between the national and State governments. He wrote in Federalist No. 17 that ''Commerce, finance, negotiation and war,'' should be the prerogatives of the national government, while ''the administration of private justice . . . [is] proper to be provided for by local legislation.''

There are few areas of law that are more appropriate in State legislation than the law of torts. In essence, tort laws deal with the duties and responsibilities that members of a community have toward one another. Tort law is, as Alexander Hamilton put it, ''private justice.'' It is an inherently local issue. That is the reason, for the past two centuries, from the beginning of our Republic, that we have delegated this responsibility of tort law to the State legislatures and courts.

The same is true of the product liability law, which emerged as a key element of tort law in the 1960's. Through time-tested methods of common law adjudication and legislative adjustments, the courts and legislatures in each State have worked together to develop laws that strike the appropriate balance between the needs of plaintiffs and defendants and those of consumers and business.

Over the past decade, many States have begun to reform their tort systems by experimenting with alternative dispute resolution, limiting punitive damages, and changing liability standards. The States continue to experiment with product liability reforms to achieve a balance between the demands of the modern economy and the need to ensure the products that enter that marketplace are safe. This is the way the Federal system is supposed to work. As Justice Louis Brandeis noted, ''It is one of the happy incidents of the Federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel, social, and economic experiments without risk to the rest of the country.''

The bill before Congress would bring the experimentation that is taking place in our States to a grinding halt by wiping most of the State product liability laws off the books and replacing them with one-size-fits-all Federal law developed right here in Washington. This is the same Washington that has been so demonized as late for passing too many Federal laws.

Now, suddenly, it is in the interests of manufacturers to have a one-size-fits-all piece of legislation. It appears as if Congress, which has had virtually no experience in legislating in this area over the past two centuries, believes it has found the single answer to the ills of the civil justice system. It has decided to impose that system on the entire Nation.

Ironically, it is occurring at a time when the Federal Government is already said to be too large. The public already resents its intrusion into affairs that properly belong before the States.

Congress ought to be focusing on health care reform, the budget deficit, and entitlement reform, not to mention terrorism and nuclear proliferation. These are appropriate concerns of Congress. The time Congress spends wading in the minutiae of product liability law, a subject the States are fully capable of regulating, will be time that should be spent on more pressing national concerns.

The supporters of this legislation maintain that a national product liability law is necessary to provide uniformity and to increase predictability. I believe this bill will have precisely the opposite effect. Litigants are no longer going to be able to rely upon well-established State law. Instead, they will be faced with the uncertainty of a Federal statute loaded with undefined, untried, and untested legal principles.

This bill is going to make the law more complicated. Since certain aspects of the State laws are going to be preempted and others are not, litigation is going to proceed under an amalgam of State and Federal law.

I will give you an example, Mr. President. S. 565 creates a new standard of liability for product sellers but does not change the law pertaining to the manufacturers of those products. So in a case brought both against a manufacturer and a seller of an allegedly defective product, the court is going to be required to apply the Federal law to one defendant and the State law to another. This unnecessary complexity will lead to greater litigation expenses, not less.

Mr. President, one of the great legal scholars of this century, Prof. Herbert Wechsler of Columbia University, once wrote that ''national action has * * * always been regarded as exceptional in our polity, an intrusion to

be justified by some necessity, the special rather than the ordinary case.''

This presumption against Federal involvement in local affairs has not been overcome by the evidence that has been presented to this body. The so-called litigation crisis that is often cited by the sponsors of this legislation simply does not exist.

The most comprehensive study to date of product liability suits indicates that they comprise 0.36 percent of all civil filings—hardly a litigation explosion. If you take away the asbestos cases, which I think are unique in our history, the number of Federal product liability cases declined by over 35 percent during the late 1980's.

Proponents of the bill also claim that there is an explosion of punitive damages and rely heavily upon horror stories of irresponsible jury awards as a justification for Federal preemption. Putting aside the fact that for every punitive damage horror story, there is a more compelling story of manufacturer misconduct, we should not legislate on the basis of anecdote. Listen to the Wall Street Journal, an open advocate of reform, which reports that the debate is largely ''driven by anecdote'' and ''truth [has been the] first casualty of tort-reform.''

I think the case for punitive damages has been overstated. The objective facts demonstrate there have been few punitive damage awards in product liability cases in the recent past. One widely cited study indicates that only 355 punitive damage awards were entered by juries during the years 1965 to 1990. And 25 percent of these verdicts were reversed or remanded on appeal.

So there is no evidence that runaway punitive damage verdicts have wreaked havoc, certainly not in my State of Maine. Punitive damages were imposed in only three product liability cases during a 25-year period—just three cases. The juries in Maine have acted responsibly. They have applied State law in a commonsense fashion and reserved the sanction of punitive damages for extreme cases in which there has been either malicious or wanton disregard for public safety on the part of some companies. Maine does not need a Federal solution for a problem that does not exist in our State. Yet, this is precisely what this law would do—force Maine to abandon its law.

Our product liability laws have been subject to sweeping criticism, but it cannot be denied that the system has been a very important protection for American consumers. From the Ford Pinto to the Dalkon shield, product liability laws and suits have caused dangerous products to be taken off the market, products that have caused horrific injuries and multiple deaths. Without product liability, including the threat of punitive damages, American consumers would be at far greater risk than they are today.

Let me recall a program I saw that involved a lobbyist for tobacco companies. He indicated that he would stop at nothing whatsoever. It did not matter what study was concocted; it did not matter whether it was truthful or untruthful. He used every conceivable trick in the book in order to defeat any legislation that would protect the American people from the effects of tobacco. This man is now suffering from cancer. I believe he had cancer of the throat and it spread to his hip. This may account for his change of heart in terms of revealing the kinds of tactics that have been applied by the company. I do not know if the allegations he made on this program are true. But if they are—if companies have deliberately lied, deliberately falsified documents, and concocted studies in order to defeat consumer protection legislation—is that not a case in which we want to see punitive damages that are not limited by the amounts set forth in this bill?

Let me give another example. Suppose a manufacturer of children's toys learns that a product has a dangerous defect that is likely to cause, let us say, 10 deaths over the lifetime of the product. Under current law, the company would probably recall the product. It would fix that defect, regardless of the cost, because it could not possibly risk the punitive damage award or suits that might follow.

But under this bill, that company would know that, since children have little or no wages, the maximum punitive damage award would be $250,000 per fatal injury. If the toy makes $20 million to $30 million in profit, the company might well decide that it makes economic sense not to recall a dangerous product.

I suspect this may have been the line of thinking by Ford Motor Co. when it put the Pinto on the market. And without punitive damages, many other dangerous products may be unleashed on the unsuspecting American consumer.

This does not mean the system is free of abuses. In a recent case from Alabama, a jury awarded $4 million in punitive damages because BMW failed to disclose that a car sold as new had in fact been damaged, and then repainted on the way from the factory to the showroom. Even though BMW may have acted wrongly in this case, in my judgment this punitive award was well out of proportion to the seriousness of the misconduct on the part of the company.

So we have examples of excessive jury awards that are outrageous from time to time. They undermine public support for the civil justice system. A narrowly tailored bill designed to curb runaway jury verdicts may be deserving of support. This bill, however, is not targeted at this problem. It uses a sledgehammer where a scalpel may be more appropriate.

Regardless of the outcome of this debate, I think the legal profession has to undertake a concerted effort to address a major premise that underlies this legislation—that the law and the legal profession no longer serve a valid public interest.

Lawyers are no longer held in as high regard as some once were. Books, plays, and movies were written about Clarence Darrow for his dedication to providing justice for the common man. Lawyers like Thurgood Marshall and Ruth Bader Ginsburg are revered for striking down legal barriers based on race and gender.

However, the esteem which the legal profession once held has fallen quite substantially in recent years. Attorneys are often portrayed as being more interested in making profits than promoting the interest of justice.

I believe that it is a minority of the profession that casts aspersion on the broad majority of lawyers who are dedicated to the best tradition of the profession and volunteer much of their time to public service. It is up to a majority of the profession to discipline those who file frivolous lawsuits, who sue parties only because they have a deep pocket, or who run up the cost of litigation solely to induce a settlement.

One of the great virtues of our civil justice system is that everyone has a right to have his or her grievance heard before a court of law. When that principle is abused, the very foundations of the system are called into question. So I think the legal profession has to take swift and meaningful action in order to rebuild the public's confidence in our civil justice system.

The legislation now pending before the Senate is not the right answer to these problems. It is a one-size-fits-all Federal solution that will end State experimentation in tort reform. It will impose uniformity on regions of the country with different needs and values. The entire bill, in my judgment, is an affront to the principle of federalism. State governments have demonstrated the capability of both developing and reforming product liability law. There is no need for the Federal Government to infringe on yet another area of State sovereignty.

Mr. President, over the weekend, I, like the Senator from Massachusetts, saw many advertisements on television, some dealing with medical malpractice, others with the impact of product liability litigation on small businesses. Of course, small companies as well as large companies have the ability to purchase insurance to cover themselves for liability suits. Manufacturers have the ability to purchase insurance to cover their exposure to liability. But when companies put into the stream of commerce a product that is inherently dangerous or has a defect and that defect causes an injury to the citizens of this country, the manufacturer should bear that responsibility, not the consumer.

This bill seeks to put a limitation on the ability of consumers to recover for the damages that have been inflicted

upon them and, yes, for punitive damages to discourage companies that either act willfully or in wanton disregard for public safety. These cases demand that punitive damages be imposed in order to discourage and deter manufacturers and the distributors of dangerous products from continuing to inflict harm upon the public.

Commercials that I saw over the weekend said we are addressing this problem of medical malpractice in California. The State legislature passed a medical malpractice reform law and guess what? Those lawsuits have now declined. We have also passed a medical malpractice reform law in the State of Maine. We have prelitigation screening panels. We set statewide standards for doctors and hospitals. States can—in fact, have—adopted changes in their tort law to deal with their particular problems. But in a State like Maine, which, over a 25-year period, has actually awarded punitive damages in three product liability cases, do we need a Federal law to tell us what to do?

It is an insult to the people of this country to say that the 12 men and women sitting in the jury cannot be trusted to weigh the evidence and decide to impose or not impose damages. This legislation sets a uniform national standard for damage awards. It says: You juries cannot go above this, your judgment cannot be trusted. We are saying that no matter how egregious the offense, no matter how defective the product, no matter how wanton the disregard for public safety, we do not trust you, ladies and gentlemen of the jury, to do what is right, to exercise common sense. And we here in the Halls of Congress we are going to tell you exactly how far you can go.

To me, Mr. President, it is an insult to all the people of this country to say that we no longer have faith in their judgment, that only Congress can determine exactly how high they can go in terms of compensating citizens of their community who have been injured by defective products. I think this contravenes everything that is being said on this side of the aisle about limiting the scope of government, reducing the power of Washington, returning power to the people, deregulating the economy, and revering the 10th amendment.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, I have sought recognition to comment about punitive damages in our legal system as they apply to tort reform. I have spoken before on this bill and have noted that I have had experience representing both plaintiffs and defendants in personal injury cases and had one very involved product liability case which I described in a floor statement a week ago today. I have noted my concern that there is room for reform of product liability tort law. But my concern is that it be done very, very carefully because the body of law in the United States, common law development is slow, laborious, careful. Common law builds up by accretion or encrustation over a long period of time and is very different from the kind of processes which we have in legislation where there are frequently only one or two Senators present at hearings and where markups are done without the kind of background or careful evidentiary study which marks development of the law, case law and common law.

There is a very erudite analysis of punitive damages in the Iowa Law Review, volume 78, appearing at page 1, published in 1992, by Prof. Michael Rustad and there are a number of aspects of that article about which I would like to comment.

Even though this is a lengthy law review article, it is worth printing in full in the CONGRESSIONAL RECORD because of the importance of tort liability generally and product liability specifically and punitive damages as it impacts on the legislative consideration which we have before the Senate.

My comments will be relatively brief compared to the scope of the article.

I start by referring to four empirical studies of punitive damages in product liability cited in Professor Rustad's law review article.

The first is by the Rand Institute for Civil Justice, which studied 24,000 jury verdicts in Cook County, IL, and San Francisco, CA, between 1960 and 1984. The Rand study stated that the ''punitive damages picture in personal injury cases has changed very little in 25 years.''

As noted in this law review article, the Rand study states: ''Product liability cases have been of special concern to many critics, but our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 through 1984.'' It further notes that, ''The rarity of punitive damage awards in products liability cases suggests that there is little need for tort reform.''

The second empirical study noted in this law review article is by the American Bar Foundation, which examined 25,627 jury verdicts handed down from 1981 to 1985, drawn from State jury verdict reporters in 47 counties in 11 States. This study found that in 5 percent of the verdicts there was an inclusion of punitive damages and that products liability accounted for 3.8 percent of the 25,627 verdicts. Of the 967 products liability verdicts, the study found 34 cases in which punitive damages were awarded. The researchers concluded that the awards were generally quite proportionate to the actual damages, and they concluded that ''the median punitive damage award is not at a level that is likely to 'boggle the mind.'''

The third empirical study noted in the Iowa Law Review article is the GAO study on the frequency and size of punitive damage awards in product liability cases in five States between 1983 and 1985. There was a review of court records for 305 product liability cases resolved through trial in Arizona, Massachusetts, Missouri, North Dakota, and South Carolina. The GAO supplemented official court records with posttrial interviews with attorneys. The General Accounting Office found that punitive damage awards were neither routine nor excessively large and that posttrial appeals and settlements substantially reduced the amount of punitive damage awards.

The fourth empirical study noted in the Iowa Law Review was conducted by Judge Richard Posner, a distinguished court of appeals judge in the Federal system, and Prof. William Landes of the University of Chicago, who examined all products liability cases ''reported in the 10 most recent volumes of each of the West Publishing Company's regional reporters'' and all ''product liability cases in the federal courts of appeals from the beginning of 1982 to November 1984.'' This study found '''punitive damages were awarded in the trial court in 10 of 172 cases.' The award was affirmed in whole in only one of the ten cases. Appellate judges reversed and remanded six of the cases for further proceedings.''

Mr. President, in an era when we are looking toward less Federal regulation, I think it is very important that we take a close look at what private actions import. This is an area which has attracted my attention since law school days, when, as a member of the board of editors of the Yale Law Review, I wrote an article on private prosecution, which is a somewhat different line, on the need when there was unwarranted inaction by the public prosecutor. In the Senate, I have authored legislation to establish a private right of action for people who are damaged by unfair foreign competition, where goods come in the United States either as a result of subsidy or dumping because of the insufficient resolution of proceedings in the International Trade Commission.

At this point, I am going to refer to a number of cases, some of which are cited in the Iowa Law Review article and some of which are found in other places.

One case of considerable interest was Richardson-Merrell's concealment of side effects of MER/29, an anticholesterol drug. In a case litigated, Toole versus Richardson-Merrell, Inc., in the California court of appeals, the evidence was that there had been fictitious reports filed by the company, that none of the abnormal

blood changes encountered in experiments was disclosed and that there was a falsified chart prepared under protest by one of company's employees which was included in the application. One advertising brochure stated that MER/29 was ''virtually nontoxic and remarkably free from side effects, even on prolonged clinical use.''

The evidence further showed evidence of high-level management with knowledge of the concealment of MER/29's known defects. There were 1,500 civil suits filed after there were guilty pleas by the company's executives. Three scientists pleaded nolo contendere to criminal fraud charges and were fined a total of $80,000 in the context of the criminal conduct which seriously injured an estimated 5,000 consumers.

Of the 1,500 civil cases which were filed in the wake of those criminal pleas, juries awarded punitive damages in three of those cases.

Another case of some concern noted in the Iowa Law Review article is one involving the Dalkon shield put out by A. H. Robins, in a case captioned Plaintiff versus A. H. Robins Co. The Supreme Court of Colorado found evidence upholding a punitive damage award with the following statement:

> Robins' marketing program which occurred over a long period of time was directed to a vast array of unwary consumers and was accompanied by false claims of safety and a conscious disregard of a life-threatening hazard known by it to be associated with its product. Robins accumulated gross revenues which exceeded $11 million from the shield alone and its net worth nearly doubled during the marketing period of this device.

Another case worthy of special note, although there are many cited in this law review article, is a case captioned Duddleston versus Syntex Labs, Inc., which involved the company's failure to test a soy-derived baby formula which resulted in thousands of infants suffering brain damage. The company had removed salt from its product without considering the effect on child development, and that was a causative factor in brain damage and learning disabilities.

Another case worthy of special note is captioned Batteast versus Wyeth Laboratories in which there was an assessment of substantial punitive damages for failure to warn physicians of certain propensities dangerous to children in the chemical composition of a drug, and the basis for the punitive damages was the company's failure to market the suppository in compliance with Federal Drug Administration adverse-reaction guidelines.

Among many of the other cases cited, my final reference is to the Minnesota Supreme Court decision in a case captioned Gryc versus Dayton-Hudson Corp. as follows:

> In April 1968, a letter from an official of [the defendant] explained that satisfactory runs were made with flame-retardant flannelette using various chemicals, but that [the defendant] was not going to use these products until Federal law so required because of the cost factor. . . [T]he decision not to use flame-retardant cotton flannelette was merely an economic one for the benefit of [the defendant]—

This gave rise to the imposition of punitive damages.

In reviewing a number of cases, and these are only illustrative, Mr. President, of what exists in the field of tort liability, the famous case involving the Pinto automobile which had the gas tank in the rear and was justified in a letter from Ford Company to the Administrator of the National Highway Traffic Safety Administration which sought to justify the dangerous condition, because it was more cost-effective to suffer 180 burn deaths with 180 serious burn injuries and 2,100 burned vehicles at a total cost of $49.5 million, contrasted with the cost of repairing 1.5 million light trucks, 11 million cars at a unit cost of $11 per car, which would cost $137 million. This has already been placed in the RECORD, Mr. President, so I will not further burden the RECORD by asking that it be printed.

Another matter of some notoriety involved the American Motors Corp. and its product, the Jeep, when there was an internal American Motors Corp. memo dated January 7, 1982, acknowledging a defect with the shackle system of the Jeep, which was known for many years to the company, and the following sentence from the memo is of some significance:

> Not to retrofit will subject Jeep Corporation to possible punitive damages on a component which has previously been the subject of several causes of action.

I ask unanimous consent that this intracompany correspondence be printed in the RECORD for its probative value in showing that the possibility of punitive damages is something to be considered in retrofitting a vehicle to make it safer.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

INTRACOMPANY CORRESPONDENCE

From: Mr. J.E. MacAfee,
To: R.M. Huffstutler
Subject: C.J. Shackles,
Location—Ext: AMTEK/33223
Date: January 7, 1962
Copy to: C.S. Sklaren, W.C. Jones, C.E. Merritt.

Confirming our telephone conversation of this P.M., we understand that vehicle 1609 will soon be tested. This test will be the fourth in the series of 1461, 1477, and 1484, a test we presume will meet with the complete satisfaction of you and your engineering staff.

Upon successful completion of testing on the new shackle design, we would appreciate the ECR being with obsolescence and the new design being incorporated at the earliest possible time. Assuming the shackle is released for CJ–5, CJ–7, Scrambler, and various export models, I will press for retrofit of all CJ–7 and Scrambler vehicles produced in the 1982 model year. This action I believe is warranted since the FMYSS 101–75 movable barrier 20 mon test which indicated a problem was completed July 22, 1981, three weeks prior to the 1982 production. Not to retrofit will subject Jeep Corporation to possible punitive damages on a component which has previously been the subject of several causes of action. Our legal staff has, to date, not seen the merits of testing the current design before a jury; it is my belief that the new design will have to be tried and thus Jeep Product Engineering should have a sufficient data file to convince not only engineers but lay persons as well.

Any action by Engineering to our purchasing group to forestall their dilatory tactics in this matter would be appreciated. An early warning to them that the design will be changed may preclude Jeep Corporation from having to pay for stock ahead of our production requirements.

R.M. HUFFSTUTLER.

Mr. SPECTER. Mr. President, an internal memo from the Cutter Co., which was involved in manufacturing blood factors for hemophiliacs, is of considerable interest. To the extent that an internal Cutter memorandum dated December 29, 1982, recommended several steps to warn about AIDS transmission through its factor concentrate product, this memo reads as follows, from one Ed Cutter to Jack Ryan and others:

> It appears to me to be advisable to include an AIDS warning in our literature for certain factors.

And there is a second document by a Dr. Bove, January 1983:

> This case increases the probability that AIDS may be spread by blood. Further, the CDC—

That is the Centers for Disease Control.

> continues to investigate the current cases aggressively and may even have a few more. While I believe our report reacts appropriately to the data at hand, I also believe that the most we can do in this situation is to buy time.

Until these documents were disclosed, the Cutter Co. argued that the obligation to warn did not arise until the spring of 1984. This same case has a cost/benefit analysis by the American Red Cross which concluded that it would cost more to make a correction than to treat the AIDS patients, with the testing costs being in the range of $13 to $67 million, whereas an evaluation of each AIDS case at $500,000 would require the prevention of some 30 to 134 AIDS claims to be cost-effective. This suggests to me, Mr. President, a wholly inappropriate evaluation of cost analysis dealing with a deadly subject like AIDS.

I ask unanimous consent that these internal corporate documents be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CUTTER

To: Jack Ryan, Carolyn Patrick, Wayne Johnson, Ralph Roussall, George Akin
From: Ed Cuttar
Date: December 25, 1982
Copes To: Arnold Laong
Subject: AIDS.

It appears to me to be advisable to include an AIDS warning in our literature for Factor IX and Factor VIII. I realize that very little is known about AIDS and the relationship the products we manufacture have in causing

the syndrome. However, litigation is inevitable and we must demonstrate diligence in passing along whatever we do know to the physicians who prescribe the product. In my opinion, three steps are called for, once we agree on the wording of our message.

1. Include it in the package insert.
2. Educate the sales force.
3. Since MDs won't be reading the package insert in most cases, send a letter to hematology specialists informing them of the warning we are putting in the insert.

ED CUTTAR.

To: AIDS Working Group, Dr. Dood, Ms. Baum
From: Dr. Cumming
Date: 3/20/84
Subject: Meeting request and report on: Progress on AIDS marker testing marketing research.

SUMMARY

Our review of AIDs marker testing issues to date brought into question the value or continuing to proceed along lines or developing a non scientific opinion research survey. Specifically:

Objectively it is difficult to make a case for adoption of AIDS marker testing,

Plasma industry projected adoption or such a test is a rather obvious marketing initiative which will serve to increase pressure on us, and

ARCBS decision-making criteria are complicated by considerations of ethics and public welfare as distinct from competitive response.

This last issue can be summarized nicely by reference to ''false positives''. Essentially all anti core test results are likely to be false positives. Specifically, it is estimated that over 6,000,000 annual units are donated by 4,000,000 persons. With 5% normal population incidence of anti core positive results this means 200,000 people may be labelled as likely to get AIDS. Contrast this with a possible 50 cases per year of AIDS avoided (0.00025 of all positives). Assuming these 200,000 people have additional testing done, costs to society may be from $20,000,000 to $100,000,000 (based on $100 to $500 per false positive). And this does not ascribe any value to mental anguish, time off work, etc. These figures and issues make the direct cost of testing minimal in comparison.

It is from this perspective that we question the value of continuing to develop a non projectable sampling effort and request a meeting to clarify as precisely as possible where we are heading and why.

BACKGROUND

Attached for your information, review, and comment are:

(1) A background document summarizing various marker tests for AIDS, and estimating effectiveness and costs, and

Three draft questionnaires designed to elicit the opinions of various interest groups on marker tests for AIDS.

The background document explores some of the costs and benefits of implementing screening marker testing for AIDS amongst blood donors. On the descriptive matrix, characteristics such as effectiveness, ease of use, availability, etc. are estimated, as well as other potential advantages and public relations effects.

The latter is an area of grave importance which must be further explored. As you are aware, the possibility exists of creating panic in the (normal) donor population from positive test results, and incurring unnecessary costs to the health care sector as these donors pursue further medical evaluation, as well as reducing the size of the donor pool. These effects must be carefully weighed against the possible benefit of reassuring the blood recipient population and the hypothetical benefit of reducing the incidence of transfusion-associated AIDS (trx-AIDS).

The cost matrix addresses the potential costs associated with implementation of the various marker tests. Review of this matrix indicates that costs for testing in all ARC Blood Service regions would range from $15 million to $67 million. If we assume that each average AIDS case has a value of $1M, then to justify use of one of the tests would require an expected reduction in trx-AIDS from ARC blood of 15 to 67 cases. Since trx-AIDS patients have averaged 50 years of age, average earnings per worker are approximately $20,000 per annum, and treatment for AIDS victims has averaged about $80,000 * * * about $500,000. This lower benefit would indicate a need to prevent 90 to 134 trx-AIDS cases from ARC blood to justify use of a marker test exclusively on economic considerations. In addition, these averted cases would have to be over and above the number of cases prevented by currently implemented screening measures.

As an example, to economically justify anti-HBc testing in all Blood Service regions, we would need to demonstrate an anticipated rate of trx-AIDS (not prevented by screening measures) of 1.75 cases per week, assuming an 88% effectiveness rate of the test. This rate is considerably above previous and current rates.

PROPOSAL

To summarize the background document, implementation or any AIDS marker test will be extremely expensive. Given the fact that tax-AIDS is still a hypothesis, that there has been no effective measurement or the success of the screening procedures which have already been implemented, and that cost justification or testing would rest on a considerably higher incidence or tax-AIDS than is currently being observed, the following recommendations are proposed for further exploration.

(1) Implement the confidential self-exclusion procedure, currently used by New York Blood Center (NYBC), in all ARC Blood Service regions.

(2) Implement one of the marker tests in Los Angeles and any other regions where there is reason to suspect a high concentration of AIDS carriers.

(3) Continue to evaluate the non-economic considerations inherent in implementing one of the marker tests systemwide.

It is in keeping with the last recommendation that the three questionnaires are attached. The non-economic considerations are primarily the opinions and beliefs of the various publics which are served by ARC Blood Services. The questionnaires which are attached are targeted at physicians who prescribe blood, the general public including blood donors and recipients, and third party payers such as Medicare/Medicaid agencies and insurers. We intend to modify or add to these questionnaires to also target hospital administrators and other signatores of annual hospital/blood region contracts.

Relative to these questionnaires, we would appreciate information or comments on the following:

Decision making criteria given results of the survey, i.e. what influence will the results of the survey have on a decision whether or not to implement marker testing?

Method of sampling and sample sizes

Content and phrasing of questions

Target audiences

PURPOSE OF MEETING

Answers to this first question are essential for further development of the survey. Admittedly if public opinion could determine that ARC implement testing, a very large sample would be required, whereas if the questionnaires are designed merely to ''test the waters'', a small screening sample would suffice. At this point, we really can't see too much value in a small, non-scientifically projectable sample. For such a sample to be useful for other than field testing of an instrument, we would have to observe a high degree of unanimity or opinion. Given the subject matter this is unlikely. For a large and statistically valid and reliable sampling effort to be most useful, we need to be very specific as to how we intend to use results from each likely outcome of the sampling. I suggest that a meeting of the group plus Dr. Doda and Ms. Baum is in order to gain this specificity or select another course of action.

REPORT TO THE BOARD COMMITTEE ON TRANSFUSION TRANSMITTED DISEASES

The major report of your Committee on Transfusion Transmitted Diseases has been issued as our recommendations to the Association. These few additional paragraphs are more my current views and concerns than a formal committee report. Nonetheless, because of my recent experiences I am anxious to share some thoughts with you.

The report that we have submitted to our members is, in my view, appropriate considering the data at hand. Since we met, however, an additional child with AIDS has been admitted to a Texas hospital. At birth the child had received seven transfusions, one of which came from a donor who now seems to have AIDS. This case increases the probability that AIDS may be spread by blood. Furthermore, the CDC continues to investigate the current cases aggressively and may even have a few more. While I believe our report reacts appropriately to the data at hand, also believe that the most we can do in this situation is buy time. There is little doubt in my mind that additional transfusion related cases and additional cases in patients with hemophilia will surface. Should this happen, we will be obliged to review our current stance and probably to move in the same direction as the commercial fractionators. By that I mean it will be essential for us to take some active steps to screen out donor populations who are at high risk of AIDS. For practical purposes this means gay males.

The matter of arranging an appropriate screening program is delicate and difficult. We have had excellent cooperation from individuals in the gay community and our deliberations have been made easier by their knowledge and ability to help us. I have no doubt that they will continue to support us and, should we need to be more aggressive in this area, will help us do it in a way that is socially responsible.

Blood banks that wish to sell plasma for further fractionation already face the need to do something. Perhaps our Committee should prepare guidelines with suggested wording for them to use. We are reluctant to do this since we do not want anything that we do now to be interpreted by society (or by legal authorities) as agreeing with the concept—as yet unproven—that AIDS can be spread by blood.

All in all this is a knotty problem and one that we will not solve easily.

I want to make a few comments about the process by which our joint document developed. We spent a great deal of time and energy and did the best we could in attempting to reach a consensus. The difficulty was to get AABB,ARC, CCBC and all the other groups to adopt a position which was acceptable to each other. It was impossible to have a small meeting; everybody wanted to attend. When we got the group together we were able to hammer out a statement that pleased the attendees. Unfortunately, the

statement had to go through several iterations with our own Board and the Boards of the other involved organizations. In all probability these modifications resulted in a better statement, but the process of getting these changes incorporated and run back and forth through the three organizations was difficult. We have had a good start at working together on this and we hope to keep it up. The mechanism was a little less smooth when it came to releasing the statements and the public relations that went with it.

I hope that we are equipped psychologically to continue to act together. I have been in contact with ARC (Dr. Katz) and CCBC (Dr. Menitove) and believe that the three of us can, together, work out whatever new problems may arise. We plan frequent conference calls to keep each other informed.

I want to comment about the Committee. They worked well together and I was particularly pleased with the input of advisory members. Having individuals who are not associated with the blood banks nor a traditional part of the blood banking community proved most useful to us. Their comments and suggestions were excellent. In a like manner, we were helped by participants from the National Gay Task Force. As we continue to react to the various challenges before us, I am sure that their help will be essential. Finally, let me acknowledge the help from the Central Office and, in particular from Lorry Rose.

No immediate end to the publicity is in sight and we will get continued calls for us to act more aggressively. We need to do whatever is medically correct. In addition, we may have to do a little more, since we are accused of burying our heads in the sand. We are not being helped by the spate of publicity about this illness, but will continue to react responsibly to whatever scientific and medical information we have.

JOSEPH R. BOVE,
Chairman, Committee on Transfusion Transmitted Diseases, American Association of Blood Banks.

Mr. SPECTER. Mr. President, another very important product involved the Bjork-Shively heart valve where internal company documents show the company was notified by the inventor in 1982 of the manufacturing defect, with the handwritten notations on the memo by the inventor to try to ''settle him down,'' a defect which was not fixed for years resulting in damages to thousands of people who used these heart valves.

Again, I ask unanimous consent that this corporate document be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

15242 SHILEY 64,
March 24, 1982.

Attn: Paul Morris.

Last night a 60 year old man, with a double valve (mitral and aortic valve) replacement performed—August 24, 1981 with a * * * degree, 25 mm in aorta and 31 mm in mitral, had rupture of the smaller strut and pulmonary edema.

During the night, I re-operated the broken mitral valve and the * * * strut was localized in the pulmonary vein. The patient has now woken, but has neurological seguele.

It is evident by now that the manufacture of the prosthetic valve is not acceptable. The small strut must be made in one piece and much more effort and priority must be put on this than has been done so far.

Your programmed conferences, in Atlanta and California in the end of August, are extremely ill timed—before an acceptable production can be achieved.

Dear friends, I am serious.

VIKING O. BJORK.

P.S. By airmail I am sending you the piece.

HANDWRITTEN NOTES BY RECIPIENT

* * * also suggested we go to Sweden to talk to Bjork.

I'd like to avoid if possible as it won't help solve problem.

Paul * * *

Kjell called to discuss * * *. Wants us to call Bjork and attempt to settle him down and convince him we are oing everything possible to get the monostrut faster—I suggest we use the ''double side'' EB Wolf method to get him valves fast! They have to be stronger than the welded strut on 70° cc.

BRUCE.

P.S. I have all employee meetings at 10 a.m. and 11 a.m.—Please call Bjork and try to settle him down and convince him that we are doing everything possible.

BS.

Mr. SPECTER. Mr. President, some of the cases disclosed procedures which would result in additional safety which were left uncorrected for very considerable periods of time, and I refer now to an intracompany memorandum of the Ford Motor Co., dated September 19, 1967, which reports:

When properly worn, the three-point diagonal shoulder belt system has been demonstrated to offer much greater protection to the vehicle occupant than does a single-lap belt alone since it prevents injuries from jack-knifing.

And in the same document:

A properly worn three-point system clearly protects the occupant better than a lap-belt-only system.

But it was not corrected until 1987 as reflected in intracompany correspondence of Ford. This is dated May 2, 1986:

I believe we should consider optional rear seat shoulder belts for reasons described in the attached memo to you from Al Slechter as a defense against future product liability claims.

These are a series of internal memos, Mr. President, which have come to public light in the course of litigation and show that litigation of product liability cases with the potential for punitive damages is a significant factor leading to product safety, which I think has to be evaluated as we consider this legislation. Further evaluation of the cost benefit occurred by General Motors in a memo dated June 29, 1973, where as a result of their cost analysis, they made a substantial change, showing that where there was concern about fatalities and damages, safety features were added.

I ask unanimous consent that this document be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

VALUE ANALYSIS OF AUTO FUEL FED FIRE RELATED FATALITIES

Accident statistical studies indicate a range of 650–1,000 fatalities per year in accidents with fuel fed fires where the bodies were burnt. There has been no real determination of the percent of these people which were killed by the violence of the accidents rather than by fire. The condition of the bodies almost precludes making this determination.

Based on this statistic and making several assumptions, it is possible to do a value analysis of automotive fire related fatalities as they relate to General Motors.

The following assumptions can be made:

1. In G.M. automobiles there are a maximum of 500 fatalities per year in accidents with fuel fed fires where the bodies burnt.

2. Each fatality has a value of $200,000.

3. There are approximately 41,000,000 G.M. automobiles currently operating on U.S. highways.

Analyzing these figures indicates that fatalities related to accidents with fuel fed fires are costing General Motors $2.40 per automobile in current operation.

500 fatalities times $200,000 per fatality divided by 41,600,000 automobiles equals $2.40 per automobile.

This cost will be with us until a way of preventing all cash related fuel fed fires is developed.

If we assume that all crash related fuel fed fires can be prevented commencing with a specific model year another type analysis can be made.

Along with the assumptions numbered above the following assumptions are necessary:

1. G.M. builds approximately 5,000,000 automobiles per year.

2. Approximately 11% of the automobiles on the road are of the current model year at the end of that model year.

This analysis indicates that for G.M. it would be worth approximately $2.20 per new model auto to prevent a fuel fed fire in all accidents.

500 fatalities times 11 percent new model autos equals 55 fatalities in new model autos.

55 fatalities times $200,000 per fatality divided by 5,000,000 new model autos equals $2.20 per new model auto.

This analysis must be tempered with two thoughts. First, it is really impossible to put a value on human life. This analysis tried to do so in an objective manner but a human fatality is really beyond value, subjectively. Secondly, it is impossible to design an automobile where fuel fed fires can be prevented in all accidents unless the automobile has a non-flammable fuel.

E.C. IVEY,
Advance Design

Mr. SPECTER. Mr. President, another similar modification occurred by the Pitman-Hutsik Co., relating to boom tip contacts used on cherry pickers with an analysis that a large number of accidents occurred with these boom tip contacts, and as a result of the jury awards in product liability cases, the design was changed.

I ask unanimous consent that the last item be printed in the RECORD.

TYPICAL ACCIDENTS

1. *Boom tip contact:* Metallic portion of upper boom contacted a line, and the operator touched these metal parts as well as another line.

2. *Boom contact or crane contact:* A non-insulated boom or lower boom of an insulated device contacted a line, resulting in injury to personnel on the ground.

3. *Phase/phase contact:* Operator in the bucket personally touched two phases or a phase and ground, resulting in an injury, but the machine carried no current.

4. *Tipovers:* Machine turned over because of: (1) improper outrigger placement; (2) outrigger malfunction or breakage; (3) outriggers were not used; (4) driving accident; (5) overload; (6) et al.

5. *Controls contacted foreign object:* Controls malfunctioned or contacted foreign object, forcing machine to continue to move against the object.

6. *Leveling cable failures:* Bucket leveling system broke for some reason, causing operation to fail.

7. *Boom collapse:* Component in boom system broke due to overload, poor maintenance, etc., allowing the boom to collapse.

8. *Boom collision:* Boom collided with personnel during operation of the machine. Boom collision is sometimes the result of a boom collapse, also.

DISCUSSION OF PERTINENT DATA

Electrical accidents account for 29 percent of the total number of accidents, but account for 77 percent ($21,500,000.00) of the active claims.

The largest single type of electrical accident is ''Boom Tip Contact.'' It accounts for 40 percent of the number of electrical accidents and 67 percent of the total dollar value of the active claims. ($18,500,000.00) Those electrical accidents involving metal boom machines usually do not lead to lawsuits and represent only 9 percent ($2,500,000.00) of the dollar value of our active claims. The same is true for ''Phase-Phase'' contacts, which account for only 1.5 percent ($500,000.00) of the active claims.

Contractors have fewer numbers of accidents than utilities, but contractors have a higher accident rate per machine. (This statement may be somewhat inaccurate, because it is felt that utilities, in some cases, tend to hide some of their accidents.)

Contractors account for 76 percent ($21,200,000.00) of the active claims against the A.B. Chance Company, while utilities account for only 15 percent of the active claims ($4,300,000.00). Of the $21,200,000.00 claims from the contractors, $18,000,000.00 resulted from electrical accidents, $15,000,000.00 of which was attributed to ''Boom Tip Contact.''

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COST TO IMPLEMENT TECHNICAL RECOMMENDATIONS

(A) Estimated cost to design a machine with the following features:

1. Insulated boom tip.
2. Insulated lifting attachments.
3. Boom interlock system.
4. Tip-over warning system.
5. Improved leveling system.
6. Improved hydraulic control system.
7. Improved placards.

Estimated time: 2 years:

Design Prototype Test, Document; $200,000.00.

Tooling: $10,000 to $25,000.00.

(B) Estimated Cost Increase of Machine: $2,000.00.

(C) Dollar value of active lawsuits as result of ''Boom Tip Contact'': $18,500,000.00.

(D) Assuming average awards paid out equal to 2.5 percent of total claims dollar value (.025 18,500,000): $462,500.00.

CONCLUSION

If $225,000.00 could be spent to alleviate the liability exposure due to ''boom tip contact'', it would appear that this expense could be justified.

Mr. SPECTER. Mr. President, finally, in a confidential legal opinion on a matter involving the Clark Equipment Co., Hancock Division, is the following statement.

* * * the lack of a back-up alarm presents a substantial product liability exposure to Clark that far exceeds any requirements of State safety laws or OSHA. In every case in which we have had an injury involving a person struck by a machine, the absence of a back-up alarm has been very crucial.

* * * The customer is not in the same position as the manufacturer and Clark must take all steps necessary to protect itself—

Showing the safety and precaution taken as a result of the liability imposed in product liability cases.

I ask unanimous consent that the full text of that document be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

BUCHANAN, MI,
August 29, 1974.

CONFIDENTIAL LEGAL OPINION

To: Phil Hoel, Hancock Division.

I have received your memo concerning making back-up alarms standard on all scrapers. I disagree with you that the decision concerning making back-up alarms standard should be made by the Sales Department.

Although there are many states that do not require a back-up alarm at this time, and, in fact, OSHA would make it optional since you can also provide a flagman to signal when to back up, the lack of a back-up alarm presents a substantial product liability exposure to Clark that far exceeds any requirements of state safely laws or OSHA. In every case in which we have had an injury involving a person struck by a machine, the absence of a back-up alarm has been very crucial. I must conclude that it is a very substantial fact in the mind of any juror that if the machine had had a back-up alarm, the injury might have been prevented. This thought must be in the minds of the jurors no matter how great the evidence is that the back-up alarms are not required by state safety laws or are not effective because the engine noise is too loud.

I think this must be an overall management decision and should not be left to the Sales Department since that department only gives basically a reflection of what the customer wants. The customer is not in the same position as the manufacturer and Clark must take all steps necessary to protect itself, whether the customer wants it or not. Accordingly, I again strongly suggest that you consider making back-up alarms standard on all scrapers. I was informed yesterday by Walt Black that Benton Harbor has decided to make such alarms standard on all loaders, and I applaud them for that decision. I would hope you could reach the same conclusion.

STEVE ANDERSON,
Assistant Counsel.

Mr. SPECTER. Mr. President, in the Iowa Law Review article that I have referred to, there is a lengthy listing of protective measures which were taken after litigation disclosed a substantial problem. They have a special probative value in showing that when product liability litigation occurs, there is a very practical impact on safety for the consumers.

For example, when the CJ–7 Jeep was found to have inadequate roll-over protection on the off-road vehicle, punitive damages caused a safety measure to be taken to redesign the product and add a new warning.

When the Toyota Corona was found to have a fuel integrity problem due to the placement of tanks with injuries and deaths, there was a redesign.

When power lines were found to have uninsulated components causing electrocutions, there was a multi-million-dollar safety program.

When there was a television manufacturer with tubes made of wax and paper which posed a fire risk, despite the company's knowledge of numerous house fires, it did not warn or redesign until the litigation in effect compelled a redesign.

There is a long list which appears at pages 81 and 82 of the Iowa Law Review article, which I shall not take the time to read now, but are worthy of special note, because once there is an aggravating factor determined in the litigation of product liability cases, there are safety measures which are taken.

Mr. President, I have taken this time to put into the RECORD some concrete cases, where the presence of liability and the presence of punitive damages has had a profound effect on influencing the conduct of the producers. I think these are matters which have to be taken into account that I have included in the RECORD so my colleagues will have access to this information when the CONGRESSIONAL RECORD is printed tomorrow. That will be in ample time for consideration of this kind of material in their legislative judgments.

Mr. President, I see that my colleague, Senator DEWINE, has come to the floor, so I will yield the floor to him and also the duties involved in wrap-up, which I have agreed to undertake thinking I would be the last speaker.

I yield to my colleague, Senator DEWINE, at this time.

Mr. DEWINE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DEWINE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DEWINE. Mr. President, I rise today to discuss in general terms the underlying product liability this Senate has now been debating for several days, and to also discuss the medical malpractice amendment that is pending before the Senate.

I intend to discuss tonight some of the concerns that I have with these bills, but also I hope to talk a little bit about some of the hopes that I have in regard to the things that I hope a well-crafted bill can, in fact, achieve, and some improvements that we can make in our current legal system.

Mr. President, I do not pretend to be an expert in this area. I have spent a considerable period of time in the last 2 to 3 months reading, talking, and more importantly, listening—listening to business men and women, listening to others who have concerns about our

current system, and some who have concerns about this particular bill.

Some people, Mr. President, have been, I think, surprised, some amazed, that this Senator from Ohio did not automatically jump on this bill, saying we will approve everything in it just because it was labeled a ''reform'' piece of legislation.

We do need reform. I think the question before the Senate today, tonight, tomorrow, next week, will be what really constitutes reform? What will truly help the small companies, small manufacturers in Ohio and other States who are threatened by the current system? But what reform, also, will we utilize that will not take away the victim's rights, nor will it stop the deterrent effect that I find to be an essential part of our system today?

I believe that we have to approach this debate cautiously and carefully. Let me first start tonight by listing a few reasons why I believe we do have to approach this very serious, very important debate from a point of view of caution. Let us make no mistake about it, even the relatively narrowly drafted bill that was introduced, that we began this debate with, even if it was passed and nothing more—no amendment, none of the amendments that we have heard about to expand the bill—if the bill was passed in its original form, it would still constitute the most radical, the most dramatic change in our civil justice system in the history of this country.

For over 200 years the tort law in this country, the civil justice system, has developed not primarily at the Federal level. Rather, it has been a homegrown product. It has been developed in State after State—in Ohio since 1880—both by statute, by action taken by the State legislature, but also in court case after court case after court case. We have developed a fairly fine-tuned tort system to handle disputes between individuals, to handle tortious conduct.

Clearly the system does not work perfectly. By and large it does work. The proposal before us is, for the first time, to federalize that tort system. The only example I can think of where this Congress really became involved in the tort law, civil justice law, was when Congress passed—and I think it was a correct decision—a bill to give help to the general aviation industry in this country. Congress acted only after it was clear that general aviation had been driven overseas. The results of that bill have been positive. We have seen jobs come back to this country. That industry now, instead of contracting in this country, is expanding. But with that exception, Congress has never gotten into this area.

I believe there are some very sensible reasons for this past reluctance on the part of the U.S. Congress. A simple way to express Congress' concern is to invoke the concept of Pandora's box. Once you open up this area of law to congressional interference, congressional control, where does that stop? Where does the debate stop?

If anyone doubts this is a legitimate concern, I ask them to look at some of the amendments that have already been offered or will be offered in the next few days. Should there be a Federal cap for lawyers' fees? What should be the contractual relationship between employers and employees? What sort of evidence should be admissible at trial? That is just the beginning.

Having said this, that it is a dramatic change and we should proceed with caution, that does not necessarily mean we should not proceed at all. But what it does mean is that we should go into this debate with our eyes wide open, and we should understand what we are tackling, and we should understand how significant a change in our law this will be.

Let me next turn to another reason I think we, particularly in the year 1995, need to approach this debate with caution. There is some irony that this historic Congress, a Congress which is devoted to thinking and talking about State prerogatives and States rights and the value of returning power to the people, the value of returning power to the States, that this Congress should today be debating a bill that does just the opposite, that really says the U.S. Congress in certain areas—product liability, medical malpractice—will impose its will, will impose a national, uniform standard on all the States in the Union.

Merely because it is strange, again, Mr. President, does not mean we should not necessarily do it. But, again, I think it points up how cautious we have to be as we begin this task. It is somewhat ironic that the very qualities we value, particularly those of us on this side of the aisle—self-help, market forces, local as opposed to national authority being better—are basically present in our current system. But they would in fact be changed and be compromised by this legislation.

Let me cite what to me is an interesting example. We have been considering in committee a regulatory reform bill. One of the complaints I have heard from business men and women, particularly small businesses, as I travel across Ohio, is how overregulated they are. I totally agree. If there is one thing this Congress needs to do it is to get the Federal Government off the backs of small business men and women. The bill we have reported out of our committee makes an attempt at doing that and I think it will improve the law. I think the bill as we report it could actually be improved. I am going to work to do that when it reaches the floor.

But there is, again, some irony here. The bill that this Congress has proposed to help business men and women get the Federal Government to back off and to stop overregulating puts more power in the hands of business men and women to sue the Federal Government, to sue the regulators. It is almost a self-help, self-enforcing provision. And the basic principle behind this bill, I believe, is that if you really want to get control of the Federal regulators, about the only way you can do it—you cannot do it by changing the law and changing the regulations—the most effective and efficient way to do that is to open up the court system and to rely on business men and women to go into court and sue the bureaucrats, sue the regulators. Again, back to some of the basic principles I talked a moment ago, self-help being one of them.

This bill, in a sense, does move in the other direction. So, again, another reason to be cautious.

This bill in its various forms, depending on which amendment we look at, caps punitive damages. I believe we need to have a very, very fine balancing test as we approach this particular issue. Punitive damages have been with us for a long time. Punitive damages—let us be very plain about it—are intended to punish. There have been some Members who have talked on the floor almost in surprise that punitive damages are used to punish. That is what they are intended to do. That is what the definition of punitive damage is.

But the real benefit to society in regard to punitive damages is not the punishment inflicted on the wrongdoer. The real value to society is that punitive damages in some cases, and in some very important cases, serve as a deterrent for some small minority of people in this country who put a product into circulation and then who, in spite of evidence to the contrary, evidence that should indicate to them they should either make a change in that product or withdraw the product or notify consumers, still go ahead and do none of the above. Punitive damages, the threat of punitive damages in some cases can serve as a deterrent.

When a jury awards punitive damages in a product liability case, that jury may in fact be saving lives. The historic purpose of punitive damages is to punish and also to deter. Here is what the Supreme Court said. I quote:

> The purposes of punitive damages are to punish the defendant and protect the public by deterring the defendant and others from doing such wrong in the future.

Let me read it again:

> . . . protect the public by deterring the defendant and others from doing such wrong in the future.

The purpose of punitive damages is to deter conduct that hurts people, but the product liability legislation we are considering does seek to limit the jury's use of that vitally important deterrent. Now, the real question, though, Mr. President, for this Senator at least, is what kind of cap, what dollar amount will achieve the legitimate, desired results that the proponents of this bill want to achieve without really hurting or eliminating this deterrent effect? That I think is one of the key

and most important questions that this Senate faces.

Let us talk a minute about how punitive damages work in real life. A tampon manufacturer received studies and medical reports that linked high absorbency tampon fibers to toxic shock syndrome. Other tampon manufacturers responded to the warning by either altering or withdrawing their product. But the manufacturer in question that I am talking about did not do that. This manufacturer tried to profit from the disadvantage of its competitors and, frankly, tried to profit from the good works of its competitors and the fact that they did the right thing. This manufacturer advertised how effective this product was at a time when its competitors were reducing the absorbency of their products because of this health warning.

The court in this particular case came to the following conclusion:

> Our review of the record reveals abundant evidence that [they] deliberately disregarded studies and medical reports linking high-absorbency tampon fibers with increased risk of toxic shock at a time when other tampon manufacturers were responding to this information by modifying or withdrawing their high absorbency products . . . that [they] deliberately sought to profit from this situation by advertising . . . [And this] occurred in the face of [their] awareness that [their] product was far more absorbent than necessary for its intended effectiveness.

The jury in the case awarded $10 million in punitive damages. The manufacturer then withdrew the product. Tragically, Mr. President, that is what it sometimes takes—a small minority of cases—to deter people. It takes punishment. It takes punitive damages. So I think we need to proceed very carefully in this area.

The Senator from Maine has offered I think a very appropriate amendment. The Snowe amendment is an attempt to preserve the punitive and deterrent function of punitive damages while at the same time placing a cap, a cap that will, in fact, bring some predictability to business decisions that are made by manufacturers, by other business men and women, a cap that will achieve a goal of not only bringing predictability but allowing the manufacturer to expand and allowing them to move into other markets and to do things that will benefit the public that they would not be able to do but for the cap.

Mr. President, I support the Snowe amendment. If for some reason this Senate would vote down the Snowe amendment and proceed to adopt the product liability legislation in its current form, then I believe the punitive and deterrent effect of these damage awards could be seriously weakened. By basing punitive damage awards only on economic damages, the product liability legislation does an injustice, the current bill does an injustice in those cases where the plaintiffs suffer only minor monetary losses but—but—severe and other permanent harm of a nonmonetary kind. The Snowe amendment would rectify that. That is why I intend to vote for it.

That being said, I should mention that I do have a concern about the equity of the Snowe formula as regards small companies versus large companies; that while in fact this cap may be appropriate for the huge companies, it may not be appropriate in regard to small companies, and we may need to provide them more assurance and more protection. I am concerned that under this particular formula small companies are punished somewhat disproportionately. A small company may well be destroyed outright by a damage award that would serve merely as an appropriate deterrent to a much larger company. This is a concern that we might want to address during the amendment process.

In fact, one way of looking at it was expressed to me by a small businessman from Ohio several weeks ago. This is what he told me: A punitive award that might just be a serious deterrent to a big company might really be a death penalty for a smaller company.

Let me list some other concerns that I do have about this bill. Earlier today on this floor, I offered an amendment concerning the civil penalties for sex abuse by doctors. I am sure that even those who strongly favor the passage of this bill will join me in making it clear that we do not want to cap damages in cases in which a doctor sexually abuses a patient. I think it would be wrong for this Senate, for this Congress to impose a national cap and to tell each State in the Union to tell the juries of each State in the Union that there is a limit on the punitive damages you can award against a doctor once you have already found that doctor has sexually abused a patient.

Let me talk about another area of concern. I intend to offer another amendment to preserve the right of juries to consider the financial status of defendants in product liability cases.

As currently written, the product liability bill would forbid juries from considering the assets of the corporation while considering what the proper punitive damages should be. This provision would drastically weaken the punitive and deterrent effect of damage awards, and that is why I will be working to amend that part of the bill.

I can find no logical reason, Mr. President, why this Congress should, in this particular case, override the settled law in virtually every State in the Union that does, in fact, allow a jury to take that into consideration.

If the jury, in the punitive, as is their job, is trying to make a punishment and is trying to deter, then it seems to me it would be wrong to deny the jury the knowledge of exactly what assets that company does in fact have, because, Mr. President, if that knowledge is denied to the jury, the jury could err either way. They may assume, incorrectly, that a company has a lot of assets and it may turn out the company does not have a lot of assets. And so when they impose that award to get the company's attention, to deter future conduct, it may not be an appropriate amount. It may be too much. It may impose an unbelievable burden on that company; or, on the other hand, it may not be enough.

Mr. President, let me make it very clear. The current system is not all good. It is not perfect. If it were, I do not think we would be here today. If it were, I would not have heard from so many people that I have heard from in Ohio about this particular problem.

What we are really doing, Mr. President, and what we should be doing, I think, ultimately, is a balancing test. That is what I think we have to do. We have to balance the benefits and costs of the current system versus the benefits and costs of this bill; or, maybe a better way of saying it, the benefits and costs of the bill that we finally do, in fact, pass.

Mr. President, I am concerned that the current system in some cases deters innovation. And I think one of the strongest—no, I think the strongest—argument for changing the current system, and the strongest argument for imposing some caps in regard to punitive damages is that the current system does deter innovation.

We all know and are aware, Mr. President, of products that have been kept off the market because of our current law. We have all heard how no company will make an antinausea drug for pregnant women. I talked yesterday to a lawyer from a major company who said no one is going to do it; simply not going to do it. ''We have the technology; we could put it on the market. But we are not going to take the risk. We are not going to accept the risk that we have to accept because of lawsuits.''

So if we can give some relief in this area, then products such as the antinausea drug for pregnant women may be able to come onto the market.

Another example, in 1992, a company stopped testing a vaccine for preventing the transmission of the AIDS virus from an infected mother to her unborn child. Think of that. I have no idea, Mr. President, whether or not that product would have made it onto the market. I have no idea whether that product would have worked. But heavens, the last thing in the world we want to do is to stop innovation in the research in regard to AIDS. What a tragedy it would be if we had the ability to move forward and to develop this particular vaccine that would keep that unborn child from being infected. That is another, I believe, argument for some change.

Also, liability concerns have hindered the development of microbicides used to prevent the spread of AIDS.

Mr. President, during this debate, we have all heard and will continue to hear provisions about lawyer's fees. There are going to be several other amendments also offered. I may support some; some I may not. I am not

too concerned about the lawyers. Lawyers can generally take care of themselves.

But, Mr. President, I think what we have to look at when we look at some of these limitations on fees is what impact it will have on the market, what impact it will have on poor people's ability to get into the ball game. And in this case, getting into the ball game means getting into court.

If some of these well-intentioned, well-sounding amendments do in fact hinder poorer people from having access to the courthouse door, then I think the right thing to do would be to oppose them. We need to preserve access to the courtroom for people who have been harmed. We should do this to their benefit, not for the benefit of the lawyers.

Last week, Mr. President, I voted for an amendment that would force lawyers to disclose their fees. I think that is a good idea. I voted for another amendment that would make sanctions mandatory in cases when lawyers bring lawsuits that are legally determined to be frivolous by a trial judge. I think that is a good idea, too.

But I do part company with the proponents of this legislation when they do things that would limit the legal rights of indigent plaintiffs. I believe that that is precisely what some of these amendments would have the effect of doing.

Mr. President, over the last 4 months, I have had more than 55 meetings with concerned Ohioans and others about the faults and merits of this legislation. I intend, Mr. President, to be working over the next couple of days and probably weeks to improve the system—to improve the system, but also to make sure we do not abandon some of the extremely positive effects of the legal system we have built up over the last 200 years.

Mr. President, that concludes my statement this evening on this issue.

Mr. President, at this point, on behalf of the leader, I ask unanimous consent that the pending amendment be set aside.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 616 TO AMENDMENT NO. 603

(Purpose: To provide for uniform standards for the awarding of punitive damages)

Mr. DEWINE. Mr. President, I send an amendment to the desk on behalf of Senator DODD.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Ohio [Mr. DEWINE], for Mr. DODD, proposes an amendment numbered 616 to amendment No. 603.

Mr. DEWINE. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike section 15 of the amendment and insert the following new section:

SEC. 15. UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES.

(a) GENERAL RULE.—Notwithstanding any other provision of law, punitive damages may, to the extent permitted by applicable State law, be awarded against a defendant in an action that is subject to this Act if the claimant establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct that was carried out by the defendant with a conscious, flagrant indifference to the safety of others.

(b) BIFURCATION AND JUDICIAL DETERMINATION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, in an action that is subject to this Act in which punitive damages are sought, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.

(2) ADMISSIBLE EVIDENCE.—

(A) INADMISSIBILITY OF EVIDENCE RELATIVE ONLY TO A CLAIM OF PUNITIVE DAMAGES IN A BIFURCATED PROCEEDING.—Notwithstanding any other provision of law, in any proceeding to determine whether the claimant in an action that is subject to this Act may be awarded compensatory damages and punitive damages, evidence of the defendant's financial condition and other evidence bearing on the amount of punitive damages shall not be admissible unless the evidence is admissible for a purpose other than for determining the amount of punitive damages.

(B) PROCEEDING WITH RESPECT TO PUNITIVE DAMAGES.—Evidence that is admissible in a separate proceeding conducted under paragraph (1) shall include evidence that bears on the factors listed in paragraph (3).

(3) FACTORS.—Notwithstanding any other provision of law, in determining the amount of punitive damages awarded in an action that is subject to this Act, the court shall consider the following factors:

(A) The likelihood that serious harm would arise from the misconduct of the defendant in question.

(B) The degree of the awareness of the defendant in question of that likelihood.

(C) The profitability of the misconduct to the defendant in question.

(D) The duration of the misconduct and any concealment of the conduct by the defendant in question.

(E) The attitude and conduct of the defendant in question upon the discovery of the misconduct and whether the misconduct has terminated.

(F) The financial condition of the defendant in question.

(G) The total effect of other punishment imposed or likely to be imposed upon the defendant in question as a result of the misconduct, including any awards of punitive or exemplary damages to persons similarly situated to the claimant and the severity of criminal penalties to which the defendant in question has been or is likely to be subjected.

(H) Any other factor that the court determines to be appropriate.

(4) REASONS FOR SETTING AWARD AMOUNT.—

(A) IN GENERAL.—Notwithstanding any other provision of law, with respect to an award of punitive damages in an action that is subject to this Act, in findings of fact and conclusions of law issued by the court, the court shall clearly state the reasons of the court for setting the amount of the award. The statements referred to in the preceding sentence shall demonstrate the consideration of the factors listed in subparagraphs (A) through (G) of paragraph (3). If the court considers a factor under subparagraph (H) of paragraph (3), the court shall state the effect of the consideration of the factor on setting the amount of the award.

(B) REVIEW OF DETERMINATION OF AWARD AMOUNT.—The determination of the amount of the award shall only be reviewed by a court as a factual finding and shall not be set aside by a court unless the court determines that the amount of the award is clearly erroneous.

Mr. DEWINE. Mr. President, I have only offered this amendment for Senator DODD so that it would qualify under the consent agreement, in that Senator DODD, at this point, is unable to be on the floor.

MORNING BUSINESS

Mr. DEWINE. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business, with Senators permitted to speak for up to 5 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

MEASURES PLACED ON THE CALENDAR

The following bill was read the second time and placed on the calendar:

S. 735. A bill to prevent and punish acts of terrorism, and for other purposes.

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC–746. A communication from the Assistant Secretary of Defense (Economic Security), transmitting, pursuant to law, the report on the Metric Transition Program; to the Committee on Commerce, Science, and Transportation.

EC–747. A communication from the Secretary of Transportation, transmitting, a draft proposed legislation entitled ''The Commercial Space Launch Act Amendments of 1995''; to the Committee on Commerce, Science, and Transportation.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. THOMAS (for himself, Mr. MURKOWSKI, Mr. HELMS, Mr. LAUTENBERG, Mr. GRAMS, and Mr. CRAIG):

S. 738. A bill to amend the Helium Act to prohibit the Bureau of Mines from refining helium and selling refined helium, to dispose of the United States helium reserve, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. PACKWOOD:

S. 739. A bill to authorize the Secretary of Transportation to issue a certificate of documentation with appropriate endorsement for employment in the coastwise trade for the vessel SISU, and for other purposes; to the Committee on Commerce, Science, and Transportation.